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PROFESSOR H. C. GUTTERIDGE, Q.C.

We regret to announce the death of Emeritus Professor H. C. Gutteridge, Q.C., who was a member of our Editorial Board from the inception of the *Review*. This is not the place for a detailed survey of his numerous contributions to legal scholarship and education, but reference must be made to his distinguished work as a teacher and writer upon Mercantile Law, and of his outstanding contributions in Comparative Law in which he was very much of a pioneer in this country. As a teacher he not only inspired his students, but captured their affection to an unusual degree, as is shown by the brief tribute which we publish below.

"Former students in all parts of the world will have learnt with the deepest regret of the death of Professor H. C. Gutteridge. No one who knew Professor Gutteridge would, for a moment, suggest that he neglected those of his students who came from Britain, but he had a particularly keen interest in students from overseas, especially those from the British dominions. To give details of his many acts of personal kindness to those students would mean the revealing of incidents which Professor Gutteridge, with that innate modesty that was not the least of his many sterling qualities, would never wish to be revealed. Suffice it to say that there are lawyers overseas to whom the kindly word and the generous act of Professor Gutteridge marked, in many cases, the turning point in their careers. They mourn the loss of a true friend.

A. G. D."

TWINE v. *BEAN'S EXPRESS, LTD.*

DECISIVE cases in the development of the law are of two kinds. There is the weighty cause which passes leisurely from High Court to House of Lords, argued at length from a multitude of authorities at every stage of its progress, while onlookers in the Inns of Court and the universities eagerly canvass the result. Equally decisive may be the obscure case, casually decided and even more casually reported. All lawyers are familiar with half a dozen or so cases which must have appeared to the judges who tried them to be so straightforward and lacking in novelty that they were doubtless surprised when the case was reported at all, and would be astounded to learn later that they were supposed to have played a part in the formulation of new doctrines.[1]

Twine v. *Bean's Express, Ltd.*,[2] would seem to fall into this second category. It was decided by Uthwatt J. sitting as an additional judge of the King's Bench Division. One day was devoted to the hearing and argument and the reserved judgment was delivered five days later. The editor of the Incorporated Council's Law Reports ignored the case but it was reported in the All England Reports, the Times Law Reports and the Law Times Reports. An appeal was taken to the Court of Appeal which spent one day on the case and did not reserve judgment. The appeal was reported in the Times Law Reports and Law Times Reports, but the All England Reports ignored it—perhaps repenting that they had touched the case at all—and the Incorporated Council's series still remained aloof.

The facts of the case are short and uncomplicated. A master owns a van driven by his servant. The master expressly forbids the servant to give lifts and reinforces the prohibitions by two notices in the van: one on the dashboard reads, "No unauthorised person is allowed on this vehicle. By order," and another on the roof above the driver's seat states that the driver has instructions not to allow unauthorised passengers and that the master will not be liable for damage happening to them. When the driver is on a journey which is clearly in the course of his employment the passenger begs a lift from the driver. The driver gives the lift but informs the passenger that he travels at his own risk. Owing to the driver's negligent driving the passenger is killed. Uthwatt J.

[1] Such cases are *Tarry* v. *Ashton* (1876) 1 Q.B.D. 314; *Bridges* v. *Hawkesworth* (1851) 21 L.J.Q.B. 75; *Blacker* v. *Lake & Elliott* (1912) 106 L.T. 533.
[2] [1946] 1 All E.R. 202; 174 L.T. 239, 175 L.T. 131; 62 T.L.R. 155, 458.

held that the deceased's widow (suing as legal personal representative) failed in her action against the master, and this judgment was upheld on appeal.

Although it is difficult to reconstruct the course of events from the sketchy reports it would seem that before Uthwatt J. the defendants disclaimed any intention of fighting the case made out by the plaintiff, but in effect rewrote the plaintiff's case for her and then argued that this case was a bad one. The plaintiff's case was put in the form that the servant owed a duty to take care, that he failed in this and was accordingly guilty of negligence, and that this was a tort committed in the course of his employment for which the master was vicariously responsible. It seems, in argument at any rate, not to have been denied that the servant committed the tort of negligence in the course of his employment, but the defendants' case was that the question to be decided "was not whether the driver owed a duty to his passenger to take care, but whether the employers owe that duty." As this argument was accepted by Uthwatt J. and formed the ground of his judgment we will proceed to examine it at once.

The judge's view may be best gathered by piecing together a number of propositions to be found in the third paragraph of his judgment. "The law attributes to the employer the acts of the servant done in the course of his employment . . . The law does not attribute to the employer the liability which attaches to the servant . . . The general question in an action against the employer, such as the present, is technically: Did the employer in the circumstances which affected him owe a duty?"

It will be seen immediately that this goes to the very root of the nature of vicarious liability. It denies, in effect, that there is such a thing as true vicarious liability, at least as far as the action for negligence is concerned. All such actions of negligence are direct actions brought in respect of the employer's own tort. It is certainly a view of the nature of vicarious liability not recognised by the great masters in the field of tort. Pollock noted the rule as being "that a master is liable for the acts, neglects, and defaults of his servants," [3] and in a passage where he distinguishes cases where "a man is held answerable for wrongs not committed by himself" from cases where the duty breached is a duty primarily imposed on the principal he cites examples of the latter, but never does he suggest that the action for negligence in driving a vehicle is included.[4] Salmond speaks repeatedly of the master being "responsible for the servant's tort" [5] and when he contrasts liability in respect of servants with liability in respect

[3] Pollock, *Torts*, 15th ed., p. 62.
[4] *Ibid.*, p. 58.
[5] Salmond, *Torts*, 10th ed., pp. 83 *et seq.*

of independent contractors he explains that this latter liability "is not properly vicarious: the employer is not liable for the contractor's breach of duty; he is liable because he himself has broken his duty."[6] Winfield speaks repeatedly of "the liability of the master for the torts of his servant."[7] Even Baty—no lover of the doctrine of vicarious liability—had no doubt that it was essentially a liability for wrongs committed by another.[8] And in many other books can be found passages which with varying degrees of emphasis make it apparent that the writer regards the liability of the master as a liability to make answer for the tort committed by his servant.[9]

Should it be argued that in all these textbooks' dicta the language is loose (a truly remarkable assumption !) and that when a writer states "The master is liable for the torts of his servant" what is really meant is "The master is liable for torts where the *actus reus* is committed not by him but by his servant," we should still expect that somewhere the writer would draw attention to the fact that in negligence cases the duty, the breach of which constitutes the negligence, is a duty owed by the master. But a diligent search through some twenty available textbooks on tort published before 1946 has failed to reveal a single instance where the author has even hinted at this significant rule. Since the decision in *Twine's* case there has been little academic notice taken of the point. Glanville Williams in *Crown Proceedings*, p. 43, appears to accept the analysis of vicarious liability made by Uthwatt J., but he has to admit that the draftsman of the Crown Proceedings Act, 1947, remained unimpressed, and the proviso to section 2 (1) of that Act very pointedly ignores what was said in *Twine's* case.[10] And if we turn from textbooks to law reports we shall have to search hard in modern times for any judicial precognition of the rule laid down in *Twine* v. *Bean's Express, Ltd.*

It is true that if we read the reports far enough back we shall find language supporting the view that the action against the master is a direct action which imputes to him the acts of the servant. In the eighteenth and early nineteenth centuries as long as the courts rested vicarious liability on the principle of the express or implied command, it was natural enough to think and speak in terms of the servant's commanded act being imputed to the master. The master by commanding the act committed the tort through the instrumentality of the servant, and the maxim *Qui*

[6] *Ibid.* 114.

[7] Winfield, *Tort*, 5th ed., *passim*: *e.g.*, p. 128.

[8] Baty, *Vicarious Liability*, *passim*, but especially the introduction.

[9] Clerk & Lindsell, *Torts*, 8th ed., pp. 68–9; Jenks, *Digest of Civil Law*, 4th ed., I, s. 747; Smith, *Master and Servant*, 8th ed., p. 222; *Restatement, Agency*, Chap. 7, topic 1, scope note.

[10] And see Glanville Williams, *Joint Torts and Contributory Negligence*, p. 115 and Hughes and Hudson, "Nature of a Master's Liability," (1953) 31 Can. Bar Rev. 18.

facit per alium facit per se was very appropriate to express this view.[11] That the conception was faulty may be gathered from the fact that it encouraged the monstrous corollary that the servant, being a mere instrument, was immune from liability.[12] It is in the nineteenth century when employer's liability came to be put on the more proper basis of "course of employment" that we no longer hear of the master being liable for the acts of the servant, and in its place men talk of him being liable "for the torts of the servant."

The conflict of these two attitudes to the nature of vicarious liability is reflected in that series of pleading cases at the end of the eighteenth century and beginning of the nineteenth century which dealt with the form of action to be brought against the master. As long as the action against the master was thought of as a direct action for a tortious act *per alium factus* it was natural to consider the nature of the act and then bring the appropriate form of action against the master. Thus, if the servant's act was a trespass the master was sued in trespass [13] and if the servant's act was mere negligence then the master was sued in case.[14] This practice was disturbed by *McManus* v. *Crickett* [15] in 1800. That case in effect established a new formula:

(i) For wilful trespasses of a servant the master is not liable in any form of action.[16]

(ii) For negligent trespasses of a servant the master is liable in case.

(iii) For negligence not amounting to a trespass the master is liable in case.

Henceforward the action against the master would always be case, but as it was still thought of as a direct action a new theory of liability was called for, and this was supplied by supposing that the master was being sued in case for his own negligence in selecting and employing careless servants.[17] This theory—a monstrous

11 "What is done by the deputy is done by the principal, and it is the act of the principal" (Holt C.J. in *Lane* v. *Cotton* (1701) 1 Salk. 17, 18); "The act of the sheriff's bailiff is the act of the sheriff" (Lord Mansfield in *Ackworth* v. *Kempe* (1778) 1 Doug. 40, 42).

12 Blackstone, Comm. i. 432.

13 *Savignac* v. *Roome* (1794) 6 T.R. 125.

14 In actions on the case the negligence of the servant is properly laid as the negligence of the master: *Turner* v. *Hawkins* (1796) 1 B. & P. 472; *Brucker* v. *Fromont* (1796) 6 T.R. 659.

15 1 East 106.

16 The reason for this immunity was that the courts assumed that the wilful trespass of a servant must necessarily be committed for the servant's own purposes. The notion that the master was liable for a deliberate trespass done in the scope of employment did not appear until *Seymour* v. *Greenwood* (1861) 6 H. & N. 359.

17 "Where the servant is in point of law a trespasser, the master is not liable as such; though liable to make compensation for the damage consequential from his employing of an unskilful servant": Lord Kenyon in *McManus* v. *Crickett*, *supra*. The theory also appears on the other side of the Atlantic: "The master is liable because he ought not to employ a negligent or unskilful servant": Aldis J. in *Andrus* v. *Howard*, Supreme Court of Vermont, 36 V.T. 248.

fiction since the master was not allowed to traverse the supposition by showing his diligence in selecting prudent and careful servants—survived for a little time and then was politely forgotten. One of its last appearances was in *Sharrod* v. *L. N. W. Ry.*,[18] in 1849. This was a momentous case for other reasons: the forms of action were about to disappear from the law and *Sharrod's* case was the last in which technicalities of trespass and case deprived a plaintiff of a remedy against the master for the admitted tort of a servant committed in the course of employment. And with the passing of the forms of action there also disappeared the rule that a master was not liable for the wilful trespass of a servant done in the course of employment. Henceforward the inquiry was not whether the servant's act was trespass or case, but whether it was a tort committed in the scope of employment. And consequently the language of imputing the acts of one person to another disappeared. We can see the change reflected in the manner of pleading; the old declaration was "*that the defendant by G. H. his servant* so negligently and unskilfully, etc."[19]; the modern statement of claim is "the defendant's servant so negligently, etc."[20]

Even if the general principle laid down by Uthwatt J. in *Twine's* case does not go so far as to bring back the old fiction of imputing the servant's act to the master it does assert that in negligence cases the negligence is that of the master—the master has a duty imposed on him and it is that duty which is breached. And this is a doctrine which is certainly difficult to reconcile with some other aspects of the law of master and servant.

For instance, it has always been understood that in cases where a master was liable for a servant's misdeeds the master and servant were joint tortfeasors.[21] If Uthwatt J. be correct they can never be joint tortfeasors in negligence cases: the master's tort is a breach of his duty, and the servant's tort is quite distinct —it is a breach of his duty. The content of the two duties being different the two breaches, even though committed *uno ictu*, cannot constitute a joint tort.

Again, there are negligence cases where, in an action against the master, there has been debate because of the existence of a disability which would prevent the plaintiff suing the servant. Thus in *Smith* v. *Moss*,[22] *Broom* v. *Morgan*[23] and in the American case of *Schubert* v. *Wagon Co.*,[24] the plaintiff in each case was a

[18] 4 Ex. 580.
[19] Bullen & Leake, 3rd ed. (1868), 361.
[20] Bullen & Leake, 9th ed. (1935), 442.
[21] Scrutton L.J. in *The Koursk* [1924] P. 140, 155; *Jones* v. *Manchester Corpn.* [1952] 2 Q.B. 852, 869.
[22] [1940] 1 K.B. 424.
[23] [1953] 1 Q.B. 597.
[24] 164 N.E. 42; and see other American cases to the like effect cited by Hughes and Hudson, (1953) 31 Can.Bar Rev. at p. 29.

wife suing her husband's master in respect of injuries resulting from the husband's negligence. On each occasion the argument for the master went: "A husband cannot commit a tort against his wife: therefore there is no tort for which the master can be vicariously responsible." The time spent in each of these cases discussing whether the rule is that a husband cannot *commit* a tort against his wife, or is that a husband cannot be *sued for* a tort against his wife, was so much time wasted if the Uthwatt view be correct, for the question would not be whether the husband-servant owed a duty to the wife, but whether the master owed a duty. The master is properly liable in these husband-servant cases for the reason given by Singleton and Hodson L.JJ., and concurred in by Denning L.J. in *Broom* v. *Morgan* and by Cardozo J. in *Schubert's* case, *viz.*, that the husband's act remains a wrongful act though the policy of the law prevents an action against him at the suit of his wife, but this immunity is personal to him and cannot be taken advantage of by a third party.[25]

It is true that in *Broom* v. *Morgan* Lord Goddard C.J. advanced the notion "that, although it is common to speak of a master's liability as vicarious, it is none the less regarded as the liability of a principal," but it is noteworthy that of the three dicta which the Lord Chief Justice cited in support of this view two date from the reign of Queen Anne, and the third is from a Scots case. Denning L.J. also doubted whether employer's liability was truly vicarious, but his one instance of "true vicarious liability" suggests that he uses the word "vicarious" in a rather special sense.[26] In any event neither Lord Goddard C.J. nor Denning L.J. lends any countenance to the view that in master and servant cases where the action lies in negligence it is some duty of the master which had been breached.

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25 "A trespass, negligent or wilful, upon the person of a wife does not cease to be an unlawful act, though the law exempts the husband from liability for the damage. Others may not hide behind the skirts of his immunity": Cardozo J. 164 N.E. at p. 43. It may be noted that *Schubert's* case was not received with unalloyed satisfaction in the United States: the *Harvard Law Review* explained the decision as "evidently occasioned by the court's desire to avert the logical consequences of a settled but antiquated rule" (42 H.L.R. 698), and elsewhere in the same *Review* it is described as "a decision peculiarly without merit" (43 H.L.R. 1050).

26 Denning L.J. referred to the former liability of the husband for his wife's torts as a case of "true vicarious liability." Such liability was an anomaly born of the procedural rule that a husband must be joined with his wife for conformity to make him liable for costs, and once being a party he was bound to satisfy any judgment which might be signed. Had it really been a case of vicarious liability the husband would have continued liable after the wife's death, but in fact the death of the wife prevented any proceedings against him. Speaking of this rule Erle C.J. said in *Capel* v. *Powell*, 17 C.B.(N.S.) 743: "It is clear to demonstration, therefore, that there is no cause of action against the husband. He is not liable for the wrong: but he is joined only by reason of the universal rule [of joining for conformity]."

We must now return to the actual decision in *Twine's* case. Having enunciated the principle that it is the duty of the employer which it is material to consider Uthwatt J. considered the extent of this duty and concluded that Bean's owed no duty because Twine was a trespasser. "Bean's did not owe a duty to the world at large to take care, but they did owe a duty to all persons who might reasonably be anticipated by them as likely to be injured by negligent driving of the van. . . . Bean's could not reasonably anticipate that there would be this passenger."

It must be admitted that this particular view is supported by the American *Restatement*[27] though for reasons different from those put forward by Uthwatt J. The *Restatement* puts the employer's immunity, not on the ground of the absence of duty, but "because of the conduct of the inviting servant." On the other hand the view expressed in the *Restatement* is opposed by some very powerful judicial pronouncements in the U.S.A.[28]

Though there is no explicit reference to the fact in the judgment of Uthwatt J. nor in the passage in the *Restatement* it is clear in each case that the rule propounded has an affinity with the well-known rule concerning the duty to trespassers coming on land and buildings. Nor is this surprising, for the law relating to the duties owed by occupiers of premises is, or should be, of a harmonious whole with the law of negligence of which it is but one aspect.[29] We may therefore spare a moment to view *Twine's* case against the background of the law relating to trespassers coming on premises.

It is a common belief that our law relating to injuries to trespassers has gradually progressed from a state of affairs where trespassers might be shot at sight, without the hampering influence of game laws, to the present position where a trespasser is afforded some slight measure of protection. Actually a careful examination

[27] *Restatement on Agency*, s. 242. "A master is not subject to liability for the conduct of a servant towards a person harmed as the result of accepting or soliciting from the servant an invitation, not binding upon the master, to enter or remain upon the master's premises or vehicle, although the conduct which immediately causes the harm is within the scope of the servant's employment."

[28] *Enright* v. *Pittsburgh R.R.* (1901) 198 Pa. 166; *Higbee* v. *Jackson* (1920) 101 Ohio St. 75.

[29] It is only because the duties owed by occupiers of premises have been laid down with more particularity than is usual in negligence cases that textbook writers find it convenient to deal with the matter in a separate chapter: *cf.* Salmond, 10th ed., p. 471. Winfield thinks that the duties owed to a trespasser and licensee are part of the law of negligence, but that the duty owed to an invitee goes beyond negligence: Winfield, *Tort*, 5th ed., p. 559. Pollock thought that it was "only in recent times that the liability has separated from the law of negligence." The reference to "recent times" appeared in the first edition of Pollock, *Torts*, in 1887, but the 15th edition in 1951 still retains the "recent."

of the authorities will show that there was always support for the view that the duty conception in the tort of negligence could well cover the trespasser in an appropriate case. As early as *Ilott* v. *Wilkes*[30] in 1820 Bayley J. described damage caused by spring guns as "a civil injury produced from want of caution on the defendant's part to guard against such injury," and that sturdy individualist Lord Bramwell thought that "if the occupier were sporting or firing at a mark on his land, and saw a trespasser and fired carelessly and hurt him, an action would lie."[31]

On the other hand it always has been recognised that the duty owed by an occupier to a trespasser fell short of that owed to licensees and invitees. For a long time the law has groped towards a differentiation based on the presence or absence of "wilful negligence" or "recklessness,"[32] but it is now coming to be recognised that the true distinction is to be found in separating negligent omissions from negligent commissions.[33] The occupier can omit to repair his premises even though a trespasser be injured by the disrepair; he can even omit to warn a trespasser who is seen to be walking into peril; but once the trespasser's presence is known or anticipated the occupier must not commit an act without taking care that the trespasser is not imperilled.[34]

The reason for the differentiation between acts of commission and omission is that two distinct categories of negligence are involved. An occupier of premises as regards persons coming on the premises owes, or may owe, two distinct duties. One duty is owed as occupier of the premises in question and relates to the condition of the premises: we can call this the Occupancy Duty. The other duty is owed whenever the occupier is engaged in carrying on some activity on the premises: we can call this the Activity Duty. The Occupancy Duty is essentially a positive duty requiring the occupier to make safe or to warn, and the breach of the Occupancy Duty is therefore always an omission. The Activity Duty obviously arises only when the occupier is carrying on the activity and consequently necessarily involves an act of commission.

The Occupancy Duty does not extend to trespassers and therefore the occupier need never warn nor make safe for them in so far as the condition of the premises is concerned. The Activity

[30] (1820) 3 B. & Ald. 304.

[31] *Degg* v. *Midland Ry.* (1857) 1 H. & N. 773, 780.

[32] "... Liable only where the injury is due to some wilful act.... There must be some act done with deliberate intention of doing harm to the trespasser, or at least some act done with reckless disregard of the presence of the trespasser": Lord Hailsham in *Addie & Sons Ltd.* v. *Dumbreck* [1929] A.C. 358, 365.

[33] "I know of no duty to a trespasser owed by an occupier of land other than, when the trespasser is known to be present, to abstain from doing an act which if done carelessly must reasonably be contemplated as likely to injure him": Lord Atkin in *Hillen* v. *I.C.I. (Alkali) Ltd.* [1936] A.C. 65, 70.

[34] *Mourton* v. *Poulter* [1930] 2 K.B. 183.

Duty extends to all persons likely to be imperilled by the activity: it is but one instance of the general duty imposed on persons who conduct themselves in physical proximity to other persons,[35] and therefore the occupier owes a duty to take care in carrying on his activity in the presence of a known or anticipated trespasser.

There is another difference between the Occupancy Duty and the Activity Duty. The Occupancy Duty is owed by the occupier and by no one else.[36] The occupier's servant does not owe the duty, and the servant cannot of his own accord change the incidents of the master's duty. The servant for his own purposes may invite a stranger on the premises but that stranger will still be a trespasser *quoad* the occupier, and the Occupancy Duty will not extend to him. But the Activity Duty is owed by all persons at all times. Any person who is on the premises, whether as occupier, licensee[37] or servant (or even trespasser), owes the Activity Duty and must take care that his activities do not imperil those who are in proximity.[38]

We can now see why most of the cases concerning the liability of occupiers to trespassers are not much in point in connection with the present problem. These concern the Occupancy Duty and the plaintiff in *Twine's* case was not basing her claim on the Occupancy Duty. These cases could have been in point only if Twine had been injured by the condition of the premises, *i.e.*, the car, as for example if he had fallen from the car by reason of a defective door or had scratched himself on a projecting nail. But the plaintiff in *Twine's* case was claiming for a breach of the Activity Duty. The activity in question was the driving of a car, and as we have seen the Activity Duty is owed by the party acting. In this case it was the servant who owed the Activity Duty and the real point to be considered was whether at the time he was engaged on the activity he was acting in the course of his employment.

[35] "Those who go personally or bring property where they know that they or it may come in collision with the person or property of others, have by law a duty cast on them to use reasonable care to avoid such a collision": Lord Blackburn in *Dublin etc. Ry.* v. *Slattery* (1878) 3 App.Cas. 1155, 1206. Lord Blackburn appears to limit the duty of those who "go" or "bring," but the man who stays at home and does something in physical proximity to another or the latter's property equally owes the duty: *Vaughan* v. *Menlove* (1837) 3 Bing.N.C. 468.

[36] *Adams* v. *Naylor* [1946] A.C. 543.

[37] *Corby* v. *Hill* (1858) 4 C.B.(N.S.) 556.

[38] A case where the court drew a clear distinction between the two duties is to be found in *Tebbutt* v. *Bristol & Exeter Ry.* (1870) L.R. 6 Q.B. 73, 75: "It is unnecessary to consider what would have been the rights of the parties if the plaintiff's complaint had reference merely to the state and condition of the platform. . . . What he complains of is an act of misfeasance done by a servant of the defendants in the course of his employment. . . ." And see *Farrugia* v. *G.W. Ry.* [1947] 2 All E.R. 565, where Lord Greene M.R. demonstrated that the trespasser's rights and duties *vis-à-vis* the owner of the soil of the highway on which the trespass took place were quite distinct from his rights and duties *vis-à-vis* a negligent motorist on the highway.

We can usefully contrast on this point the two old cases of *Lygo* v. *Newbold*[39] and *Lynch* v. *Nurdin*.[40] In *Lygo* v. *Newbold* the plaintiff who travelled on a cart without the permission of the owner but with the connivance of the servant driver, was injured when the cart broke down. The action was clearly for breach of Occupancy Duty: no negligence on the part of the servant could be or was alleged. The plaintiff failed on the grounds that he was a trespasser. In *Lynch* v. *Nurdin* the plaintiff was equally a trespasser but the gist of the action on this occasion was the negligence of the servant in leaving the cart unattended, a breach of Activity Duty.

Another type of case which has been bedevilled by a confusion between the Occupancy Duty and the Activity Duty is to be found in that line which descends from *Degg* v. *Midland Ry.*[41]—the so-called "volunteer cases."

At the time when *Degg's* case came before the court there were two lines of cases dealing with the right of an injured servant against his master. One line of cases concerned the Occupancy Duty and descends from *Priestley* v. *Fowler*.[42] The other line of cases concerned the Activity Duty and descends from *Hutchinson* v. *York, etc., Ry.*,[43] or to be more exact from the American case of *Farwell* v. *Boston, etc., R. R.*[44] *Priestley* v. *Fowler* has often been execrated as the foundation of the doctrine of common employment: in fact an examination of the report shows clearly that the plaintiff based his case on a breach of Occupancy Duty as applied to the van,[45] that nothing turned on the van having been overloaded by a fellow servant (if indeed it was a fellow servant who did the overloading), and that the doctrine laid down was not applicable merely to the relationship of master and servant.[46] It was *Hutchinson's* case which first established in this country that a servant must be supposed to have contracted on the terms that he would, as between himself and his master, run the risk of fellow servants breaking their Activity Duty, and so laid the foundations of the doctrine of common employment.

Then we come to *Degg's* case. Degg had voluntarily gone to the assistance of some railway servants who were having difficulty in turning a truck on a turntable. He was killed by the negligence of the railway servants and his widow's action under Lord Campbell's Act met with instant hostility from the court. Bramwell B. began the judgment of the court by suggesting that the

[39] (1854) 9 Ex. 302.
[40] (1841) 1 Q.B. 29.
[41] (1857) 1 H. & N. 773.
[42] (1837) 3 M. & W. 1.
[43] (1850) 5 Ex. 343.
[44] (1842) reported in note to 3 Macq. 316.
[45] The declaration averred that "it became the duty of the master on that occasion to use due and proper care that the said van should be in a proper state of repair and that it should not be overloaded."
[46] See Bohlen, 20 H.L.R. 27.

company would not have been liable to one of their own servants in consequence of the doctrine of common employment and therefore it was impossible to suppose that Degg by volunteering could "impose any greater duty on the defendants than would have existed had he been a hired servant." The fallacy here is patent. It was precisely because Degg was not a hired servant that his widow might conceivably have recovered. A hired servant could have been confronted with his contract of hiring in which he had agreed to assume the risk of fellow-servant negligence, but there was no such contract to flaunt in the face of the unfortunate Mrs. Degg.

Bramwell B. apparently appreciated the fallacy because he sought to reinforce his opinion by appealing to the law relating to trespassers. He puts the question: "If a servant is driving his master in a carriage, and a person gets up behind, and the servant, knowing it, drives carelessly and injures that person, the servant may be liable, but why the master?"[47] The answer which he gives is that it cannot be open to a wrongdoer to create a duty, but he immediately realises that this will not suffice for an answer since the wrongdoer by his wrongdoing has managed to create a duty in the servant. He, therefore, offers another explanation. The servant driving the carriage is like a landowner shooting on his land: the act is not negligent *per se* but it will become negligent if the plaintiff's presence in the area of danger is known. Now, says Bramwell B., an innocent act has become negligent because of a reason personal to the actor, *i.e.*, his knowledge, and just as a master is not liable for the wilful act of his servant[48] so by parity of reasoning he is not liable for an act which is only a wrong for reasons personal to the servant.

The obvious criticism of this is that in most cases where a servant commits the tort of negligence in the course of his employment he is in fact negligent only "for reasons personal to the servant." Negligence being the absence of due care in the circumstances it is only by a consideration of the circumstances as they affect the servant that we can determine whether the act was negligent or not.[49]

The truth is that the "volunteer" cases—which, let it be observed, have never undergone the scrutiny of the House of Lords[50]—rest on no very secure foundation. The courts seem to have taken the not unreasonable view that there was not much to choose between the regular servant and the *ad hoc* good Samaritan,

[47] It will be seen that the question supposes facts similar to those in *Twine's* case.
[48] Bramwell B. was speaking before the decision in *Limpus* v. *L.G.O. Co.* (1862) 1 H. & C. 526.
[49] Of the large number of cases where a master was held liable for the negligence of his servant and which have depended on a knowledge of facts available only to the servant we select: *Poland* v. *Parr* [1927] 1 K.B. 236; *Kimber* v. *Gas Light & Coke Co.* [1918] 1 K.B. 439.
[50] See Lord Wright in *Radcliffe* v. *Ribble Motor Services* [1939] A.C. 215, 247.

but as they had penalised the servant by inventing the contract to run the risk of fellow servants' negligence they were bound to do something equally grotesque to penalise the volunteer. Accordingly they have disallowed the volunteer's claim, sometimes by conferring on him an entirely non-existent contract of service, sometimes by regarding him as an intermeddling trespasser and then falsely assuming that he has been injured by a breach of the Occupancy Duty. Degg, for example, was not killed because of the defective condition of the turntable (breach of Occupancy Duty) but because railway servants carelessly carried out their duties in his proximity (breach of Activity Duty).

* * * *

Uthwatt J. cited only two cases in the course of his judgment. *Tolhausen* v. *Davies*[51] certainly does not support his conclusions but rather supports the contrary. In that case the defendant's horse bolted as a result of the negligence of the defendant's servant. The horse made for home and galloped into the yard where it knocked down the female plaintiff who was on a social visit to the defendant's wife. The defendant was held not liable, not on the ground that he could not have anticipated the female plaintiff being in the yard, but on the ground that *the servant* could not have anticipated her presence.[52] The other case—*Walker* v. *Midland Ry.*[53] seems little in point. There a guest at an hotel went in search of a w.c. in the night, wandered into a service room and fell down a lift shaft. It was held that the occupiers of the hotel were not liable, as their duty to take care for their guests' safety did not extend to every room in the hotel, but only to those rooms where guests might reasonably be supposed to be likely to go. The case did not involve any specific act of negligence of an employee. It may be disrespectful to suggest that a High Court judge could get mixed up in his authorities, but one really wonders whether Uthwatt J. was not thinking of another Walker who went to law against a railway company—*Walker* v. *G.N. Ry. of Ireland.*[54] In that case a child who was *en ventre sa mère* when involved in a railway accident was denied recovery because the defendants could not be held to owe a duty to an unborn child whose presence on the railway premises was unknown. This second *Walker* case is much nearer to *Twine's* case, with the significant difference that in the former case neither the defendants nor their

[51] (1888) 58 L.J.Q.B. 98.

[52] *Ibid.*, 99, Lord Esher: "I think the Divisional Court were right in holding that there was not sufficient evidence to show that the defendant's servant ought to have anticipated that there would be any such person as the plaintiff's wife in the backyard." Fry L.J.: "The duty which the defendant's servant owed was to be careful towards all persons whom he might reasonably anticipate would be injured by his carelessness."

[53] (1886) 55 L.T. 489.

[54] (1891) 28 L.R.Ir. 69.

servants could reasonably know or suspect that the child was present.

* * * *

Twine's case in the Court of Appeal can be dealt with shortly. Greene M.R. considered the case "a perfectly simple one." He appears to have accepted the view of Uthwatt J. that if the plaintiff were to recover she must show a breach of duty owed by the employer,[55] but he rested his judgment rather on the ground that the defendants derived their immunity from the fact that the driver had gone outside the scope of his employment. "Was the driver, in giving a lift to the deceased man, acting within the scope of his employment? The answer clearly is No. He was doing something which he had no right to do, and *qua* the deceased man he was as much on a frolic of his own as if he had been driving somewhere on some amusement of his own quite unauthorised by his employers."

There is a new basis for a decision in the defendants' favour, and there is no trace of this reasoning in the judgment appealed from. It may be conceded at once that the driver was not acting within the scope of his employment in giving Twine a lift yet it can be objected that it was not the giving of the lift but the subsequent dangerous driving which brought about the death.[56] The argument that if the servant had not gone outside the scope of his employment and given the deceased a lift the latter would not have been present at the subsequent display of negligence and that therefore the lift was the cause of the injury has been criticised as "another application of the fallacious 'but for' doctrine."[57]

It was, perhaps, to meet this unexpressed objection that Greene M.R. suggested the notional splitting of the servant's activities: the servant driving his master's van along the road is *qua* most people acting within the scope of his employment, but *qua* Twine he is on a frolic of his own. Ordinarily one would say that the proposition "He is a servant acting within the scope of his employment yet his act is outside the scope of his employment" would be appropriately placed among the more inscrutable assertions of the Athanasian creed, and this novel approach sends one running to the reports to see if there are other cases of servants with a dual personality who have managed to act within and without the scope of their employment at one and the same moment.

[55] "The appellant . . . can, of course, only succeed if she can show that her husband's unfortunate death was due to a breach of duty owed towards him by the defendants"; 62 T.L.R. at 459.

[56] One can imagine a case where the giving of the lift was the direct cause: *e.g.*, the driver on seeing a friend on the pavement pulls over to give him a lift, but goes too near the kerb and knocks his friend down.

[57] See 21 *Columbia Law Review* 79, where there is an acute criticism of the *Twine* v. *Bean's* type of case.

Unfortunately for the most part the reports yield only cases where the servant's frolic of his own has constituted a clear deviation from the master's business. The coachman who drives off to join thieves,[58] the employee who slips home to dinner,[59] the housemaid who gives up laying the fire and starts to sweep the chimney,[60] the garage attendant who begins to settle an argument with his fists,[61] the tram conductor who leaves his tram to box small boys on the ear,[62] all these have allowed their master's business to stand still while they attend to other matters. The nearest we can get in our own reports are those cases where the servant has smoked while carrying on his master's business,[63] but these cases invariably turn on the fact that the smoking may be at the same time a negligent mode of performing that business. A closer case to the one we are considering is to be found in the American case of *Phillips* v. *Western Union Telegraph Co.*[64] In that case the servant was a messenger boy proceeding on foot to deliver a message. As he passed a newsvendor he snatched a paper from him and started running. Looking back over his shoulder as he ran he collided with the plaintiff and caused her severe injuries. Here we have a case where the servant was at the moment of the accident proceeding directly, if in haste, to the destination prescribed by the master and at the same time making good his escape from the consequences of a purely private venture. The court held the defendants not liable, but on the singular ground that as the servant was on foot he was "merely exercising a public right valuable to himself as a facility for gaining a livelihood as well as to his employer." It was nowhere suggested that really the boy was sustaining two personalities—the messenger proceeding to his goal and the thief fleeing from Nemesis in the person of an angry newsvendor.

It may be that where the servant is making one journey serve the dual purpose of his master's business and his private convenience and the injury is caused by some agency connected with his own private venture then the master is not liable. For example, if a servant were a member of a revolutionary organisation and carried bombs for his associates when on a journey to deliver his master's goods and the plaintiff were injured by an explosion, it is clear that in such circumstances the master would not be liable. But this is far away from *Twine's* case where the injury was caused by the negligent management of the vehicle which was being used to carry the master's goods on the master's business. In Salmond

[58] *Cheshire* v. *Bailey* [1905] 1 K.B. 237.
[59] *Higbid* v. *Hammett* (1932) 49 T.L.R. 104.
[60] *McKenzie* v. *McLeod* (1834) 10 Bing. 385.
[61] *Warren* v. *Henleys Ltd.* [1948] 2 All E.R. 935.
[62] *Radley* v. *L. C. C.* (1913) 29 T.L.R. 680.
[63] These cases are collected and discussed in *Century Insurance Co.* v. *N.I. Road Transport Board* [1942] A.C. 509.
[64] [1917] 217 Mo. 676.

on *Torts* [65] it is stated that "if the servant is really engaged on his master's business, the fact that he is at the same time engaged on his own is no defence to the master, even though it was the competing claims of the servant's business which caused him to perform his master's negligently." Even stronger must be the case, as in *Twine's* case, where the servant's negligence was quite severable from the private venture.

Since 1946, *Twine's* case has been referred to by the courts on two occasions. In *Conway* v. *George Wimpey & Co.*[66] Sellers J. merely applied the case to one of very similar facts and in the Court of Appeal Asquith L.J. regarded *Twine's* case as having the double *ratio decidendi*, (a) that the deceased was a trespasser, (b) that the giving of the lift was outside the scope of the driver's employment. In the Northern Ireland case of *Fitzgerald* v. *G. N. Ry. (Ir.)*[67] MacDermott J. (now Lord MacDermott C.J.) equated Twine to a mere volunteer to whom no duty was owed.

* * * *

However much the above remarks may have convinced that *Twine's* case was wrongly decided there must still remain a feeling that neither Twine nor his widow should in point of justice have recovered against the employers. How, then, are we to base this intuitive feeling on sound legal grounds?

The principle *volenti non fit injuria* springs to mind, and it is not without significance that Pollock thought that the volunteer cases might be explained on this principle.[68] On the other hand Pollock thought that "the whole law of negligence assumes the principle of *volenti non fit injuria* not to be applicable," [69] and in *Dann* v. *Hamilton* [70] we have authority for saying that a person who voluntarily accepts a lift is not barred by *volenti non fit injuria* even though he knows the driver is prone to negligence or even intoxicated. Since there was nothing of the sort alleged in *Twine's* case the principle of *volenti non fit injuria* does not appear to offer much help. Indeed it is difficult to see what specific risk Twine is supposed to have assumed as compared with any other member of the public.

Can we rely on the notices in the van as disabling Twine and his representatives from recovering? This was a possibility hinted at by Uthwatt J. though the pleadings in the case did not allow the point to be considered. It is submitted that a notice, written or verbal, can operate only as a contractual bar.[71] It is open to

[65] 10th ed., 97.
[66] [1951] 2 K.B. 266.
[67] [1947] N.I. 1.
[68] *Torts*, 15th ed., p. 127.
[69] *Ibid.*, p. 120.
[70] [1939] 1 K.B. 509.
[71] Where there is no contractual relationship a notice is ineffectual, otherwise it were in the power of every motorist to avoid liability to pedestrians by having his car bear large placards: "No liability accepted."

the car owner to say: "The terms of the contract between us are that I give you a lift but my liability for negligence is excluded." In such a case if the plaintiff sues on the contract the terms clearly exclude liability: if he sues in tort it is open to the defendant to plead the contract as a defence. In a case where the car is driven by a servant who has express or implied permission to give lifts the situation is the same: the servant enters into a contract as agent for the master who can then rely on its terms as a defence to an action either in contract or in tort.

But in a case like *Twine's* case where, at the moment of the giving of the lift, both the servant and the passenger know that the master has given no authority to offer contracts of carriage, the contract entered into can only be a contract with the servant alone. It is open to the servant to exclude his own liability if he cares, but at least the contract must contain the implied term that the passenger cannot look beyond the servant to the master.[72] If the master were sued in tort in a direct action it is questionable whether he could take advantage of a contract entered into by the plaintiff with a third person, but since the master is sued as being responsible for the tort of another it may well be that he is entitled to rely on the terms of the contract entered into by that other.[73]

Before we part with the case a word may be said of the convenience of the doctrine in *Twine's* case. The argument that it is the master's duty which is material to be considered and that the master owes no duty where the injured plaintiff's presence was not anticipated by him may lead to some surprising and unjust results. Suppose the negligent servant driving on the highway knocks down one of the master's typists who has overslept that morning and is hurrying to the desk where she ought to have been half an hour before. May the master refuse damages on the ground that she was not among the persons who might reasonably be anticipated as likely to be imperilled on the occasion in question? Even the old doctrine of common employment was kinder than that! Or suppose a bus with a notice "No standing passengers allowed." Is a standing passenger injured by the driver's negligence to be denied recovery on the ground that the bus proprietor could only contemplate the presence of sitting passengers? In these and many other cases which one can imagine it is the servant alone who knows what third parties are being exposed to peril through his negligent act, and it is hard to believe that the master's

[72] On the facts of *Twine's* case it would seem that the contract between the servant and Twine contained an express term to this effect.

[73] *Cosgrove* v. *Horsfall* (1946) 62 T.L.R. 140, shows that where the servant is sued he cannot rely on a contract between the plaintiff and the master, but that decision went on the ground that there was no evidence from which it could be inferred that the master was the agent of the servant for the purpose of making the servant a party to the contract. When the master was sued for the servant's tort it is reasonable to suppose that in assuming the servant's liability in tort he also assumes the benefit of the servant's contract.

responsibility is bounded by his prescience of circumstances over which he has no control. The case of *Farrugia* v. *G. W. Ry.*[74] is a distinct illustration of the master being held liable to a plaintiff whose presence was unforeseeable. In that case a servant in charge of a lorry loaded with a high box negligently drove under a low bridge and the box fell on a small boy who just previously had been hanging on to the lorry and was running after it to climb on again. The argument that the defendants had no reason to suppose that a trespasser or near-trespasser would be running behind the lorry was clearly put to the Court of Appeal and clearly rejected as irrelevant.[75]

Conclusions

1. The general principle enunciated in *Twine's* case, that in master and servant cases where the plaintiff sues in negligence it is the duty of the master which has to be considered, is erroneous and is inconsistent with the essential nature of vicarious liability.

2. In so far as the plaintiff in *Twine's* case failed because Twine was a trespasser on the vehicle, the decision is wrong because the fact that Twine was a trespasser would be material only in a claim based on the unsafe condition of the vehicle.

3. In so far as the plaintiff in *Twine's* case failed because the servant acted outside the scope of his employment in giving Twine a lift, the decision is wrong because Twine was not injured by this act but by the subsequent negligent driving of the servant.

4. Any claim against the master by an unauthorised passenger whom the servant has permitted aboard the vehicle is barred by the fact that the master can take advantage of the implied term in the contract between servant and passenger that the master is to be exempt from liability for negligence (*Sed quaere*).

F. H. Newark.*

[74] [1947] 2 All E.R. 565.
[75] *Ibid.*, 567.
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PASSENGER CHARGES SCHEMES 1952–3
AND
THE VOICE OF THE CONSUMER

THE problem of the imposed contract,[1] that is, of the contract concluded between parties of unequal bargaining power, is one which has occupied our social-legal system for many centuries. A full study of the treatment of imposed contracts is not possible here. But, by way of background to the present paper, the reaction in society and at law stimulated by the existence of imposed contracts may be very briefly outlined. At least four major methods of redressing inequality in bargaining power have developed.

(1) There has been the organisation of parties, as in the case of employers' associations and trade unions.

(2) Direct and diverse statutory intervention has occurred, like the usury laws of the fifteen and sixteenth centuries, the Carriers Act, 1830, or the Hire Purchase Act, 1938.

(3) In the courts, there has grown up, so far, judicial control of broadly the following kinds :—

(a) the simple rescission of contracts at common law for duress, or their rescission, with or without terms, in equity on grounds of undue influence, surprise [2] or unfair advantage [3];

(b) the displacement of imposed, written terms by a misrepresentation as to their nature or scope [4];

(c) the enforcement of a prior oral warranty in place of written terms formally agreed to later [5];

(d) the use of the idea of the fundamental breach to displace exemptive clauses, as in *Alexander* v. *R. E.*[6];

(e) the vigorous use of the canon of contractual interpretation, that a contract is, in case of ambiguity, to be construed against the party relying on it; as, *e.g.*, in *Canadian S. S., Ltd.* v. *The King*[7]; *Minister of Materials* v. *Steel Bros.*,[8] and recent estate agent cases [9];

[1] See, generally, Prausnitz's pioneer work in England, *The Standardisation of Commercial Contracts*; also Friedmann, *Law and Social Change in Contemporary Britain*, Chap. 2.

[2] *e.g.*, *Evans* v. *Llewellin* (1787) 2 Bro.C.C. 150; *Williams* v. *Williams* (1809–10) 16 Ves. 72.

[3] *e.g.*, *Wood* v. *Abney* (1818) 3 Madd. 417; *Fry* v. *Lane* (1888) 40 Ch.D. 312.

[4] *Curtis* v. *Chemical Cleaning & Dyeing Co.* [1951] 1 K.B. 805.

[5] *Couchman* v. *Hill* [1947] K.B. 554; *Harling* v. *Eddy* [1951] 2 K.B. 739.

[6] [1951] 2 K.B. 882. See also, *Smeaton Hanscomb* v. *Setty* [1953] 1 W.L.R. 1468, 1470.

[7] [1952] A.C. 192.

[8] [1952] 1 Lloyd's Rep. 87.

[9] See Prof. L. C. B. Gower's discussion of this trend in five cases concerning estate agents' commission notes in 13 M.L.R. (1950) 491. But, the Achilles heel of this judicial method was successfully exploited in *Trinder* v. *Haggis* [1951] W.N. 416. *Cf.*, in the field of sale of goods, *L'Estrange* v. *Graucob* [1934] 2 K.B. 394.

(f) an attitude of antagonism towards a written contract in misleading form [10]; and

(g) the application of general notions of equity and policy illustrated, *e.g.*, in the rule of construction of mariners' contracts in *The Nonpareil* [11]; or the rules against clogs on the equity of redemption or the criterion of reasonableness applied to restraint of trade clauses and their severance in contracts of employment [12]; or the resistance to attempts to oust the jurisdiction of the courts over the contractual constitutions of trade unions foreshadowed by the Court of Appeal in *Lee* v. *Showmen's Guild*.[13]

(4) Finally, there is the fourth method that has been built into the structure of certain public commercial corporations, namely, the establishment of organs to receive and voice the complaints of consumers, and, generally, to watch over their interests with regard to charges, and the quality and contractual conditions of service. Thus, during the legislative period of 1945–50, there were set up for the coal industry the Industrial and Domestic Coal Consumers' Councils, and Area Consultative Councils for the protection of customers of the gas and electricity undertakings.[14]

The Transport Act, 1947, adopted a slightly more complicated arrangement. Under its provisions [15] the Central Transport Consultative Committee and the Scottish, Welsh and various Area Users' Consultative Committees were created to watch over consumer interests, including rates and terms of carriage. In addition, the Transport Tribunal was entrusted, among other matters, with the major power of confirming Charges Schemes or rejecting them or confirming them subject to modifications,[16] such schemes, once confirmed, having overriding legal force within their defined sphere of operation.[17] The legal change in the contractual conditions of passenger carriage effected by paragraph 8, proviso (*b*) of the 1952 scheme,[18] which is the principal subject-matter of this paper,

[10] See *Roe* v. *Naylor* [1917] 1 K.B. 712, (1918) 87 L.J.K.B. 958.

[11] (1864) B. & L. 355, 357.

[12] See, especially, N. S. Marsh, "Severance of Illegality in Contract," 64 L.Q.R. (1948) 230, 347.

[13] [1952] 2 Q.B. 329.

[14] See J. A. G. Griffith, "The Voice of the Consumer," 21 *Political Quarterly* (1950) 171; D. N. Chester, *The Nationalised Industries*, 2nd ed., pp. 31 *et seq.* The jurisdiction of the Air Transport Advisory Council is limited to "facilities provided by the Airways Corporation, or . . . charges for any such facilities" (Civil Aviation Act, 1949, s. 12 (2)). "Facilities" probably do not include conditions of carriage: Shawcross & Beaumont, *Air Law*, 2nd ed., § 191, n. (*a*).

[15] Transport Act, 1947, s. 6.

[16] ss. 78 (4), 79 (4), 80 (5).

[17] s. 78 (5).

[18] Now, para. 32, proviso (*b*) of the amending and consolidating B.T.C. (Passenger) Charges Scheme, 1953. Until the 1953 Scheme came into force, the Scheme of 1952 was saved by the Transport Act, 1953, s. 20 (2). As this paper is mainly concerned with the antecedents of and innovations first made by the 1952 Scheme, it is the latter that will be discussed above, reference being made to the 1953 Scheme only where necessary.

emanated not from the Consultative Committees but from the Tribunal with the concurrence of the British Transport Commission.

The relevant portions of paragraph 8 read :—

"Save in so far as the contrary is provided in this scheme the Commission may make the use of any of the services or facilities to which this scheme relates subject to such reasonable terms and conditions as they may determine :—

Provided that any term or condition which—

(b) purports, whether directly or indirectly, to exclude or limit the liability of the Commission or of the Railway Executive or of the London Transport Executive [19] in respect of the death of or bodily injury to any person making use of the said services or facilities, not being a passenger travelling on a free pass; or

(c) purports, whether directly or indirectly, to prescribe the time within which or the manner in which such liability may be enforced, shall be void and of no effect."

Before Nationalisation

To assess accurately the nature and effect of paragraph 8, a few words are necessary about its historical setting in inland transport law.[20]

In the case of the carriage of *merchandise*, the monopolistic position enjoyed by rail carriers during the nineteenth century led to their inserting in contracts unfair conditions of carriage. This dominance over their trader-customers was broken partly by extending the Carriers Act, 1830, to apply to rail transport, but mainly by the enactment of the Railway and Canal Traffic Act, 1854, s. 7, and by the "fair alternative" interpretation of section 7 in *Peek* v. *N. Staffordshire Ry.*[21] and *M. S. & L. Ry.* v. *Brown.*[22] The Standard Terms and Conditions promulgated under the Railways Act, 1921, formed a rationalisation of the conditions of carriage that had become standard form by the time of the First World War : the main axis about which they revolved was the doctrine of the fair alternative affirmed by the House of Lords in 1863–83.

Similarly, at the beginning of the nineteenth century, there arose between road carriers and traders a conflict over the terms imposed by the carriers which was initially mitigated by the 1830 Carriers Act : and, in the fullness of time, further legislation would doubtless have become necessary but for the intervention of rail

[19] These provisions continue to govern the railway services and facilities provided by the B. T. C.; 1953 Scheme, para. 3.

[20] See Kahn-Freund, *Law of Inland Transport*, 2nd ed., Chaps. 10–12; Leslie, *Law of Transport by Rail*, 2nd ed., Chaps. 20–26.

[21] (1862–3) 10 H.L.C. 473.

[22] (1883) 8 App.Cas. 703. For a full explanation and discussion of the "fair alternative," reference should be made to Kahn-Freund, *op. cit.*, Chap. 12. and Leslie, *op. cit.*, Chaps. 20–23.

carriage. By the time, however, that road transport was again in heavy demand earlier in the present century, the competitive co-existence of rail carriers and large numbers of road carriers enabled the principle of freedom of contract to work apparently without intolerable conflict of interest in this field.

In the case of the carriage of *passengers,* which is the main concern of this paper, we see, in the first place, that the mounting toll of road accidents earlier in this century produced section 97 of the Road Traffic Act, 1930, which nullified any clause in a contract of carriage of passengers by road that purports to exempt the carrier from the consequences of breaking his common-law duty to take care for the safety of his passengers. But this provision covers only passengers carried under contract : the free pass man is not protected.[23] As railway passenger transport did not suffer from a similar degree of accident-proneness, at least in the last fifty years, the principle of freedom of contract was there left undisturbed. But the railway companies before nationalisation did not take advantage in all cases of their power to contract out of liability for breach of their passenger carrier's duty of care at common law.

The precise scope of their self-limitation of power may be conveniently stated by reference to one particular aspect of the technical rules governing the procedure of contracting out in the genus of cases that includes the railway ticket species. Those rules are, of course, two-, possibly three-fold ; the offeror must take reasonably sufficient steps to bring the terms on the document, board or poster to the notice of the offeree (unless the latter had in fact actual notice), these steps must be taken within the time-limits of the offer and final acceptance in question so that the terms on the document, board or poster are given contractual force, and, possibly, the terms must not be unreasonable. The potentialities of the possible requirement of reasonableness of terms were never fully exploited by the judges, the vast majority of whom adopted, as in the decisions concerning tortious conspiracy and the more important restraint of trade contracts,[24] what was in effect a completely *laisser-faire* attitude. Two interpretations of the requirement have been recorded in the reports.

The one interpretation involves in its ultimate phase the entire negation of the requirement of reasonableness. Its discussion took place in cloak-room ticket cases, the principles in which, however, are theoretically applicable to travel ticket cases. To begin with, Byles J. in 1862, said : " One of those conditions is that the terms contained in the notice should be reasonable terms. I think that

[23] *Wilkie* v. *L.P.T.B.* [1947] 1 All E.R. 258.

[24] For the analytical law of the matter, see Dix, " Law Relating to Competitive Trading " ; also Prof. R. A. Eastwood, " Trade Protection and Monopoly," 3 *Current Legal Problems* (1950) 100. For the sociological jurisprudence of the matter, see Friedmann, *op. cit.*, Chap. 6.

is essential. Suppose such a notice as this contained a condition to the effect that, whatever the nature or value of the goods, if the bailor does not claim them within two days, they shall belong absolutely to the railway company—no one could say that, if the party put a notice of this kind into his pocket he assented to such a stipulation as that." [25] And, similarly, Bramwell L.J. in 1877, said: "It is asked, what if there was some unreasonable condition, as for instance to forfeit £1,000 if the goods were not removed in forty-eight hours? Would the depositor be bound? I might content myself by asking: Would he be, if he were told 'our conditions are on this ticket,' and he did not read them. In my judgment he would not be bound in either case. I think there is an implied undertaking that there is no condition unreasonable to the knowledge of the party tendering the document and not insisting on its being read—no condition not relevant to the matter in hand." [26] The possible trends of commercial behaviour in the thick of the nineteenth century seem, according to the judicial view, to have been rugged indeed. It would be no exaggeration to say that the terms envisaged by the two great commercial judges would nowadays be regarded as surpassing the wildest commercial schemes. If the requirement of reasonableness of terms had solely the meaning suggested by those concrete examples, then, in the light of practical reality, it had or was to have no meaning at all. But so much was not stated.[27]

The general practice of the courts, however, was to treat the requirement as non-existent. So, typically, Viscount Haldane L.C. said in the railway ticket case of *Grand Trunk Railway of Canada* v. *Robertson*: "It cannot be accurate to speak, as did the learned judge who presided at the trial, of a right to be carried without negligence, as if such a right existed independently of the contract and was taken away by it. The only right to be carried will be one which arises under the terms of the contract itself, and these terms must be accepted in their entirety." [28]

The requirement of reasonableness as made by Byles J. and Bramwell L.J. was expressly discussed and rejected by Sankey and Bray JJ. in 1920. Sankey J. said: " . . . the remarks of Byles J. and Bramwell L.J., above referred to, have been misunderstood. There may be conditions on a receipt or ticket given under circumstances like the present and constituting a contract, which do not bind a person to whom it is given, but that is not because such conditions are unreasonable, but because they are so extravagant as to amount to fraud, or so irrelevant as to be entirely foreign to the contract which the parties are making. An instance of the first might be found in a case where the person handing such a

[25] *Van Toll* v. *S.E. Ry.* (1862) 12 C.B.(N.S.) 75, 88.
[26] *Parker* v. *S.E. Ry.* (1877) 2 C.P.D. 416, 428.
[27] See also, Stephen J. *Watkins* v. *Rymill* (1883) 10 Q.B.D. 189.
[28] [1915] A.C. 740, 748.

receipt to the other party inserted in it a condition which no honest man would think of inserting and no ordinary man would dream of finding there; as . . . that the article deposited should be forfeited if not reclaimed in five minutes. An instance of the second might be found where there was a condition quite foreign to such a contract; as . . . that before the depositor was entitled to reclaim the article deposited he should become a shareholder in the company's undertaking. The first would be a fraudulent and the second an irrelevant [condition] and neither would be binding." [29] So, in Sankey J.'s hands, the special requirement that terms should not be fraudulent, irrelevant or unreasonable shrank to the special requirement that they should not be fraudulent or irrelevant. Under Bray J.'s hands, any special requirement of this kind disappeared entirely: "I do not think, if the dictum of Bramwell L.J. is fairly read, it lays down the rule supposed by the learned county court judge. Possibly the dictum of Byles J. does. If they do, I am not bound by them and do not agree with them. Every contract is voidable by fraud, and if the condition is so irrelevant or extravagant that the party tendering the ticket must have known that the party receiving it could never have intended to be bound by such a condition, then . . . the assent of the party receiving the ticket was obtained by fraud, he would not be bound. The mere fact that the judge or the jury considered the condition unreasonable would not . . . be sufficient justification for a finding that the assent was obtained by fraud." [30] Thus, as unreasonable clauses are not void, as irrelevant clauses will be the same as fraudulent and as fraud is a *general* ground for relief, no special requirement obtains.

The other interpretation of the requirement of reasonableness in *Clarke* v. *West Ham Corporation* [31] must now be considered. There, the corporation, like the Railway [32] and London Transport Executives, was bound under statute to carry any passenger, not being an objectionable person, who offered himself and was willing to pay the published fare, provided they had accommodation for him; again, like the Executives, the corporation was unable to charge higher than stipulated maximum fares, and was obliged to exhibit in its tramcars, like the Executives in their stations, a list of the current fares charged. A list was duly exhibited on the tramcar in question with a special notice stating, as the fact was, that the fares charged were less than the authorised maximum and that in consideration thereof a passenger was only carried on

[29] *Gibaud* v. *G.E. Ry.* [1920] 3 K.B. 689, 703.
[30] *Ibid.*, 699–700.
[31] [1909] 2 K.B. 858.
[32] Although the R.E. is now abolished (B.T.C. (Executive) Order, 1953: S.I. 1953, No. 1291), it is convenient to continue to refer to it in this paper, the analysis and argument in which apply at present to the B.T.C. as manager of the railways and will, I think, apply with equal force to the ultimate successors of the Executive.

terms that the maximum amount recovered from the corporation on account of any injury suffered by a passenger and for which the corporation were legally liable was £25. Held : the corporation were not entitled to impose a condition limiting their liability for negligence without giving the passenger the option of travelling at a higher fare without any such condition. Farwell L.J. said : " I am of opinion that the condition is illegal when no alternative is offered. *A common carrier may no doubt impose reasonable conditions, and the question whether they are reasonable or not must depend on the facts of the particular case.*" [33] Cozens-Hardy M.R. and Kennedy L.J. made similar statements.[34] The analogy between carriage of passengers by tram and carriage by train is clear enough.[35]

In 1947, however, in the air transport case of *Ludditt* v. *Ginger Coote Airways*,[36] the Privy Council reaffirmed the position it had previously adopted in *Grand Trunk Railway of Canada* v. *Robinson* to the effect that, while a carrier of passengers owes at general law a duty of care for their safety, he may freely contract out of his general legal liability and it is not for a court to invalidate such contract merely on the ground of its unreasonable nature. With regard to *Clarke*, the Privy Council said : " . . . their Lordships do not regard the decision . . . in *Clarke* . . . as giving any real help or guidance. . . . While they do not think it necessary to give any opinion on the correctness of much that was said in that case, or of the actual decision, the judgment at least of the majority in the Court of Appeal turned largely on the construction of the statutes regulating the tramways operated by the corporation . . ." [37]. Bearing in mind even the merely persuasive character of Privy Council decisions, it is doubtful how far the door still remains ajar for the application and further development of the common law rule in *Clarke* that exemptive clauses at least in the case of personal safety must be reasonable.[38]

However this may be, the reason, as Professor Kahn-Freund has pointed out,[39] why the rule in *Clarke* has never been tested in an English railway case is probably because the railway companies did not in practice cancel their common law liability under ordinary fare contracts. Exculpatory clauses concerning passenger injury or death through carrier's fault were, however, inserted in all other types of passenger contracts, like cheap or tourist return tickets, season, excursion and workmen's tickets, which represented the vast majority; although the companies sometimes in

[33] *Ibid.*, 879–80. Italics added.
[34] *Ibid.*, 875, 876, 883–4.
[35] *Cf.* the arguments in Leslie, *op. cit.*, 501–2; Kahn-Freund, *op. cit.*, 327, n. 2.
[36] [1947] A.C. 233.
[37] *Ibid.*, 246.
[38] *Cf.* the opinions of Shawcross and Beaumont, *op. cit.*, § 352, n. (c), and Paton, *Bailment*, 269.
[39] *Op. cit.*, 327, n. 2. *Cf. Penton* v. *S.R.* [1931] 2 K.B. 111.

such cases made payments to injured passengers or their estates *ex gratia*. The foregoing discussion of the requirement of reasonableness at common law is not, I think, entirely academic. Paragraph 8 of the 1952 scheme introduces the requirement anew, or, perhaps more accurately, introduces a new requirement of reasonableness of terms and conditions, which may have repercussions on the common law position. To this new requirement I shall advert shortly.

To complete the pre-nationalisation history of paragraph 8, two final segments need to be fitted into place. Standard Terms and Conditions C2, D2 and N2 (b) provide for a special procedure by signed contract to relieve the rail carrier from any liability towards "a person in charge of a consignment of livestock" who is permitted to travel in the same train with the livestock. In the case of carriage by merchandise train, this relief is available whether or not the drover travels free of charge: where, however, livestock and drover are carried by passenger train, the procedure is—*semble*—available only when the drover is permitted to travel without payment of fare. Finally, many railway companies acquired, by their private Acts of Parliament, special statutory limitation of liability up to £100 in the case of injury to persons travelling under workmen's tickets. Examples of these provisions are to be found in the Metropolitan District Railway Act, 1893, s. 12, or the South Eastern and London, Chatham and Dover Railway Companies Act, 1899, s. 32, or the North Western London Railway Act, 1899, s. 81 (5).[40] The Railway and London Transport Executives inherited these privileges from their predecessors.[41]

Since Nationalisation

After nationalisation, the following sequence of events led finally up to paragraph 8. First, shortly after the British Transport Commission took over the inland transport system, the Railway and London Transport Executives expunged from the conditions upon which their travel tickets are issued the condition exempting them from liability for injury or death caused to passengers through the fault of the Executives' servants.[42]

Then, in May, 1950, proceedings were inaugurated before the Transport Tribunal to consider the B. T. C.'s draft London Area (Interim) Passenger Charges Scheme. To the evidence, arguments and recommendations submitted to the Tribunal during this period

[40] See Hodges, *Law of Railways*, 7th ed. (1888), I, 503; Macnamara, *Law of Carriers by Land*, 2nd ed. (1908), 530–1; Boyle and Waghorn, *Law Relating to Railway Traffic* (1901) I, 332.

[41] Transport Act, 1947, s. 14 (2). The new railway managements to be formed under the Transport Act, 1953, will doubtless step into the shoes of the old Railway Executive in this respect.

[42] See the Railway Executive's "Conditions upon which Tickets . . . are Issued," dated May 1, 1950. Those of the L.T.E. of similar date are the same on this point.

the Central Transport Consultative Committee saw fit to make no contribution of its own, reporting to the Minister of Transport: "The London Committee considered this application at the request of a number of parties who objected to the scheme, but decided that in view of the exhaustive nature of the public inquiry into the matter by the Transport Tribunal no useful action could be taken by them. The Central Committee were in accord with this decision." [43]

In its final judgment of August 23, 1950, the Tribunal raised for the first time the question of the particular exemptive conditions of carriage under discussion. They said: "It has not been unusual for railway companies to limit their common law liability for accidents on their railways to passengers carried at cheap fares and in the case of passengers carried at workmen's fares there are in some cases statutory provisions limiting liability to £100. We were informed that the commission do not desire to limit their common law liability in respect of accidents to any category of passengers, not being free pass holders, carried by any of the services to which this scheme relates and we have so provided in the scheme." [44]

The provision mentioned took the shape of paragraph 12 (2) of the London Area Passenger Charges Scheme, 1950, which read: "No special provisions, statutory or otherwise, limiting or excluding the liability of the London Transport Executive or the Railway Executive in respect of death of or personal injury to a passenger not being the holder of a free pass conveyed by any of the services to which this scheme relates, shall have effect." For a time, then, one law applied to the "London Area" [45] and another, slightly different law to the rest of the country. But, on May 1, 1952, the provisions for the London Area were abolished and replaced by the nation-wide B. T. C. (Passenger) Charges Scheme. In this instance, again, the Consultative Committee decided to play no part, reporting: "We received from the Commission a copy of their application to the Transport Tribunal for confirmation of the above scheme, but in view of the comprehensive nature of the Public Inquiry at which more than 200 objections covering every class of interest would be considered, we decided that no action on the part of the Committee was necessary." [46]

The 1952 scheme abolished workmen's tickets throughout the country. The scheme did not, it is true, do this in so many words, but it is difficult to avoid drawing such a conclusion from the classification of passenger fares used by the scheme which makes

[43] H.C. Paper 126 (1950–1), para. 16.
[44] Proceedings of the T.T.: Application 1950, No. 225, p. 5.
[45] See the London Area Passenger Charges Scheme, 1950, paras. 2 and 3.
[46] H.C. Paper 79 (1951–2), para. 11.

no mention of workmen's fares, but only of early morning fares, into which workmen's fares were seemingly intended to be generalised and merged. This reading of the scheme is confirmed by the identical view taken by the Central Transport Consultative Committee in their report of April 8, 1952, to the Minister of Transport on the Passenger Charges Scheme under discussion.[47] Hence, provisions like section 12 of the Metropolitan District Railway Act, 1893, fell into abeyance; and apparently, for this reason, the reference to statutory provisions in paragraph 12 (2) of the 1950 Scheme was not repeated in paragraph 8, proviso (*b*) of the 1952 Scheme.

However, on June 16, 1952, in the House of Commons, the Minister of Transport, in describing the fares concessions that were later to be made, spoke of shift workers' and other workmen's tickets as if they had never been affected by the scheme and had continued in being; and, subsequently, both workmen's tickets that are issued in the early morning, and shift workers' tickets, that are issued at various times of the day, were reintroduced.[48] Under the Transport Act, 1947, the alteration of a charges scheme is a matter for the decision of the Transport Tribunal alone on the motion of certain kinds of listed, representative bodies.[49] Power is not bestowed on the Minister to alter a charges scheme by his statement, or direction or in any other way than through the Transport Tribunal.[50] The Ministerial statement or direction reviving workmen's tickets as such appears therefore, I respectfully submit, to have been a method of amending the Charges Scheme *ultra vires* the Transport Act, 1947, and the B. T. C. were strictly under no obligation to conform. But they did conform, and the draftsmen of the Scheme may now regret having eschewed the inelegancies of abundant caution, though it would be unthinkable that the B. T. C. should, at this time of day, take advantage of the old private Acts.

Workmen's tickets apart, however, what was matter of grace under the railway companies and matter of self-restraint under the Executives has now become matter of law. The railway ticket decisions remain important, of course, for the legal principles which they helped to develop and which continue to apply both to other terms and conditions incorporated by railway tickets into carriage contracts (subject to paragraph 8), and to the incorporation of terms in contracts, generally, by document, board and poster. But, henceforward, Mrs. Thompson will not go without her legal remedy.

[47] Cmd. Paper 8513, paras. 44, 48.
[48] See *The Times* newspaper, August 15, 1952.
[49] s. 79.
[50] See ss. 79, 80.

Effect of Paragraph 8 on Other Railway Ticket Conditions

Paragraph 8 of the 1952 Charges Scheme is confined in its effect to those services and facilities to which the scheme relates. The latter are defined in paragraph 6 as, " all the services and facilities for the carriage of passengers and their luggage by rail . . . in Great Britain and all cloakroom or left luggage facilities for the storage of passengers' luggage in Great Britain which are from time to time provided by the Railway Executive and the London Transport Executive as agents of the Commission." [51]

The terms and conditions which the Commission attaches to scheme facilities and services are divided by paragraph 8 into two categories :

(1) those terms and conditions that are automatically void, *viz.*,

(a) those which exclude or limit the liability of the Commission or the Executives in respect of the death of or bodily injury to *any person* [52] making use of the services or facilities (other than a free pass man), and

(b) those which prescribe the time within which or the manner in which the Commission's liability may be enforced; and

(2) all other terms and conditions, which must be " reasonable " to be valid.

The possible effect of these provisions on some existing terms and conditions is worth exploring briefly.

Death of or Injury to Persons

The important change produced in the contract for the carriage of passengers by rail has already been discussed. There remains to be mentioned the Executives' conditions of issue of platform tickets which include the following : " At certain stations, persons not proceeding by train will be admitted to the platforms on presentation of a platform ticket. The tickets, which may be obtained at these stations, on payment of the appropriate charge, are issued upon, and subject to . . . the special condition that the Executive . . . shall not be liable for personal injury (whether fatal or otherwise) . . ., delay to or detention of the holder . . . by whomsoever or howsoever caused." [53]

It is not entirely clear whether the permission given to the public to enter platforms for a small charge for the purpose of

[51] The current Passenger Charges Scheme of 1953 does not define the services and facilities to which the Scheme relates. Their definition is left to be inferred from the subject-matter of the Scheme; from this it is plain that the services and facilities to which the provisions of the 1953 Scheme relate are, in respect of rail travel, the same as those explicitly described in para. 6 of the 1952 Scheme.

[52] Italics added.

[53] See the R.E.'s Conditions upon which Tickets are Issued, dated May 1, 1952, and the L.T.E.'s Conditions of Issue of Platform Tickets, dated August 31, 1952, Cond. 26.

meeting or seeing off passengers is a facility to which the Charges Scheme relates. The question of construction involved is whether enabling passengers to be met or seen off by friends, relatives and acquaintances amounts to a facility "for the *carriage* of passengers."[54] With reference to the interpretation of the scheme generally, neither the scheme itself nor the Transport Act, 1947, confers on the Tribunal any jurisdiction exclusive of or even concurrent with that of the common law courts. It would seem to follow that the interpretation of the scheme is, subject to express provision to the contrary, a matter for the common law courts. What view the latter would take of the particular point of interpretation under discussion is impossible to predict. The best one can say at present is that the facility considered would not be a scheme facility on a narrow construction of the phrase "for the carriage of passengers," but would be on a liberal construction.[55]

If the platform facility were held to be governed by the scheme, the condition quoted would be void in accordance with paragraph 8. But, if the platform facility were construed out of the scheme, then the attitude of the court towards the question whether such clauses adopted by carriers in relation to their business must be reasonable, at least where they involve personal safety, would become all important.[56] One or two relevant considerations may be put forward here.

The grading in the law of tort of the liability of occupiers according to the class of entrants on to their premises has come in for heavy criticism at the hands of modern judges and legal writers, who see with dismay the spread of a general and wholesome duty of care being impeded at a few points by those specific, older established and narrower duties. Similarly, in my opinion, criticism may be levelled at the Railway and London Transport Executives who have preserved a two-fold classification of contractual entrants on to their platforms. Passengers, whether departing from or arriving onto platforms are covered both by the *Francis* v. *Cockrell*[57] warranty and as common-law invitees. Other persons seeing passengers off or meeting them at the platform do so at their peril, at least if the condition quoted above is valid. The anomaly goes a stage further. If a passenger's friend who has come to see the passenger off is injured, say, in the station hall by the collapse of a piece of defective roofing of which the Executive knew (or ought to have known), he will have his remedy at common law.[58] But, for the price of a platform ticket, he may be injured on the

[54] See n. 51, *supra*.
[55] The reasoning of Lynskey J. in *Stowell* v. *R.E.* [1949] 2 K.B. 519, might be advanced in favour of a liberal construction.
[56] If the rule in *Clarke's* case were upheld (or revived), its application by analogy to those entering railway platforms under contract with the rail carrier would not afford undue difficulty.
[57] (1870) L.R. 5 Q.B. 501.
[58] As an invitee, following *Stowell's* case, *supra*.

platform by the defective roofing and have no remedy at all. Plainly, it is necessary to have control by platform tickets of persons entering on platforms to avoid excessive crowds, to deter the unlawful boarding of trains, and even as a source of revenue. But these reasons which justify the control of platform entrants hardly justify stripping one class of them of their common-law rights.

In order that the anomaly mentioned might be eradicated, and in order, further, that this class of exemptive condition might be treated consistently by the law as a whole, it is to be hoped that the courts will, if they construe the platform facility out of the scheme, apply anew the common-law requirement of reasonableness to this platform ticket condition. If this were done, it is to be hoped that the condition would be held to be unreasonable and void.

Loss of, or Damage to, Goods

Two existing conditions, in relation to goods, afford reference points for discussing the second category of terms and conditions established by paragraph 8.

The Railway Executive's Regulations and Conditions applicable to Passengers' Luggage, No. 5 (3) (*g*) (which clearly relates to a scheme facility), purports to exempt the Railway and London Transport Executives from liability for "special, indirect or consequential loss or damage" in respect of the loss, misdelivery or detention of or damage to deposited articles.[59] Suppose a passenger, who is a scientific instruments manufacturer, leaves a valuable scientific instrument in a railway cloakroom, duly declaring its true nature and value and paying the required deposit money, and explaining that he would call for it in an hour when he had to have it for the purpose of securing an important contract for his business. The article is badly damaged during the hour through the negligence of the cloakroom attendant, and, consequently, the important contract is lost. Surely, it is strongly arguable, in an action by the manufacturer against the Executive, that it would be reasonable and fair that the Executive should not be allowed to escape the payment of special damages. If Condition 5 (3) (*g*) were accordingly held to be "unreasonable,"[60] the Executive might legitimately here reintroduce the exemptive clause in the form of a fair alternative rate and degree of liability. The higher

[59] See the R.E. Conditions, cited in n. 53, *supra*.

[60] The reasonableness of a particular term is, of course, a question of fact. The main considerations constituting a suitable criterion of reasonableness, here, would seem to be, the nature of the services and facilities provided, the scope of the exemptive term, and the extent to which the current outlook is deemed to approve that the travelling public should or should not enjoy for its money common law coverage as well as the services and facilities provided in the particular case.

rate might be that which includes the sum needed to offset liability insurance the Executive might take out to meet such contingencies.[61]

The second condition is to be found in the platform ticket conditions already noticed : namely, that, where a person buys a ticket to enter a platform, " the Executive . . . shall not be liable for . . . loss, damage, or delay to or detention of [the holder's] property by whomsoever or howsoever caused." [62] If this facility is held to fall within the scheme, this condition should be treated *pari passu* with Condition 5 (3) (*g*) above; and, here again, the exemptive condition might properly be reintroduced in the form of a fair alternative rate and degree of liability. If, however, the platform facility is governed by common law alone, then, it is submitted, the exemptive condition should, if only for the sake of consistency, be similarly treated : the old common-law requirement of reasonableness in such cases might, without undue difficulty, be revived though personal safety is not here involved.

A Procedural Point

I turn to a final matter. Let us assume that the scientific instruments manufacturer in the case above seeks to recover damages, above all special damages, from the Executive.

Now, the total jurisdiction of the Transport Tribunal, both that part inherited from the Railway Rates Tribunal, the Railway and Canal Commission and the Appeal Tribunal (created by the Road and Rail Traffic Act, 1933), and that part conferred for the first time by the Transport Act, 1947,[63] nowhere includes the power to take common-law actions for damages. A power to award damages has come down to the Tribunal, but only as a relief ancillary to the exercise of its wide but specialised jurisdiction over a large number of defined transport matters.[64] Neither the Railway and Canal Commission nor the Railway Rates Tribunal ever entertained an action for damages at common law.[65] Such an action arising out of damage or loss sustained while making use of railway services and facilities falls exclusively within the purview of the common law courts. Accordingly, the present case would come in the first instance before, say, the High Court.

Plaintiff will succeed in recovering special damages provided the relevant Condition be held invalid, *i.e.*, " unreasonable." Paragraph 9 of the 1952 Charges Scheme provided that, " Any question as to the reasonableness or otherwise . . . of any term or condition imposed or sought to be imposed by the Commission

[61] It ought to be noted that the railways do not at present, as a general practice, insure themselves against common law liability.

[62] See R.E. conditions in n. 53, *supra*.

[63] See the provisions collected and referred to in Butterworth's *Annotated Legislation*, No. 49 (The Transport Act, 1947), at pp. 31–2.

[64] Railway and Canal Traffic Act, 1888, s. 12; Leslie, *op. cit.*, 674–5. insure themselves against common law liability.

in the exercise of the power conferred by paragraph 8 of this scheme, shall be determinable by the Transport Tribunal." Paragraph 33 of the 1953 Charges Scheme has substituted for "determinable," the word "determined."

The question whether the use of the word "determined" in the current scheme gives the Tribunal an exclusive jurisdiction over issues of reasonableness of conditions is a question of general interpretation of the scheme, and, consequently, for the court to decide. The change made in 1953 strongly suggests an intention to give the Tribunal an exclusive right to decide such issues. If the court took this view of the matter, it would become necessary, in the case envisaged, for the parties to take this particular issue over to the Tribunal and bring back its decision to the court in, as it were, pre-1875 manner. The procedure would be clumsy, but there would exist only one arbiter of the reasonable nature of such terms and conditions; and perhaps the highest transport court in the country is the best judge of these questions.

But, if the High Court held that a concurrent jurisdiction was intended, it might then proceed to apply its own criterion. In this event, it would be desirable for the court's criterion and finding to coincide with findings of the Tribunal on the same issues. To harmonise the views of court and Tribunal from the outset, the court might invite one or two members of the Tribunal to sit with it as assessors. However, in a case where the Tribunal had already —in some proceeding falling within its jurisdiction [66]—pronounced on the reasonableness of the precise condition, it would be desirable that the court should follow the Tribunal's finding. Whether the court is obliged to do so is a matter of uncertainty.[67]

C. Grunfeld.*

[66] As in *The Poultry Assen. of G.B. and R.E.* (1948) 29 R. & C.T.C. 69.

[67] *Cf.* the similar uncertainty with regard to decisions on the reasonableness of charges: Kahn-Freund, *op. cit.*, 71.

Some of the theoretical difficulty canvassed above might well be by-passed in practice if the railways, on a claim being made, go first to the Tribunal on the validity of an exemptive condition, and discharge or defend the claim in the light of the Tribunal's decision.

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NOTE ON THE CAUSES OF AN ACCIDENTAL OCCURRENCE

THE causes of an accident continue to give rise to difficulties in the courts, of which recent examples are to be found in *Harvey* v. *Road Haulage Executive* [1952] 1 K.B. 120; *Biddle* v. *Truvox, etc.* [1951] 2 T.L.R. 968; *Stapley* v. *Gypsum Mines, Ltd.* [1953] 2 All E.R. 478; *Jones* v. *Livox Quarries, Ltd.* [1952] 1 T.L.R. 1377 and *Cork* v. *Kirby Maclean, Ltd.* [1952] 2 T.L.R. 217.

Most of these are cases of accidents in industry, which tend to raise more perplexing problems than road accidents, perhaps because their causes often lie farther back in time.

The object of this note is to go back to first principles and suggest a greatly simplified approach to these problems.

Professor Glanville Williams, in his *Joint Torts and Contributory Negligence*, at pp. 239–41, thinks that the proper starting point is to consider the "scientific" causes of an occurrence. I should disagree with this view in any case, so far as it depends on the passage quoted from Professor Ayer as to what is meant by a scientific cause, because I do not myself feel that logical positivist philosophy is a safe foundation for legal principles. There is, however, a more fundamental objection, which does not depend on personal tastes in philosophy. Scientists are concerned to discover universal laws, according to which certain causes always produce, or tend to produce, certain effects. Lawyers are not concerned with universal laws, but with the causes of an *individual happening*, and, what is even more important, a happening which has occurred by chance or fortuitously.

The physical causes of an accident: their multiplicity. Once it is perceived that the inquiry is into the causes of a *chance happening*, a reliable key to all perplexities lies to hand. It is to be found in Aristotle's explanation of chance (Metaphysics, Book VI). According to this explanation, there is no such thing as *the cause* of an accident (a truth which lawyers are now realising after many uncertainties). Chance or accident is due to the fact that the world (whether of human affairs or of nature) is made up of many persons and things, each following a causal sequence according to its own nature. Chance happenings result from the intersection of several distinct causal sequences at one time and place—Aristotle gives the illustration of a man who has eaten salty food, and therefore goes to quench his thirst at a nearby fountain. Robbers, who are hiding by the fountain, spring out and kill him. Here there are three distinct causal sequences: Water, percolating beneath the soil, accumulating, and penetrating

its crust at a particular point, where a fountain is built; robbers, pursued for their previous crimes, who at last find a hiding place at that particular spot; the salty food, leading to thirst, and the visit to the fountain at the fatal moment.

A similar illustration might be given from a common type of road accident. One causal sequence is atmospheric conditions—humidity, atmospheric pressure, grit from an industrial town, causing fog to drift intermittently across the road; another sequence is the actions of a motorist, who has stopped his car by the roadside; a third is the actions of another motorist who, approaching at a high speed, crashes into the stationary car.

Every accident, then, results from a multiplicity of causes—always at least two, sometimes three or even more. Thus a brief analysis of the cases quoted gives the following results:

Case	*Causes of accident*
Harvey v. *Road Haulage.*	Car left stationary; approaching vehicle.
Biddle v. *Truvox.*	Machine left unfenced; actions of machine attendant; actions of second workman, which caused first man to come into contact with the machine.
Stapley v. *Gypsum.*	Unsafe condition of roof resulting in fall of rock; failure of workmen to make safe; actions of one workman in going underneath it.
Jones v. *Livox.*	Workman assuming position on back of vehicle; movement of vehicle; movement of second vehicle colliding from behind.
Cork v. *Kirby Maclean.*	Workman subject to epilepsy, having attack on scaffold; unsafe condition of scaffold resulting in fall.

So far we have been dealing with the physical causes of an accident, without regard to responsibility; and if by "scientific" causes Professor Glanville Williams means physical causes, I would agree that this is the proper starting point; and I think he would agree with me, though for different reasons, that every chance happening has not one cause, but a multiplicity of causes. I disagree with Professor Williams and his philosopher, however, in their view that every *antecedent* of an occurrence is one of its physical causes.

Legal responsibility. The physical causes of an accident are, of course, no more than the starting-point. Lord Wright says:

" In the varied web of affairs, the law must abstract some consequences as relevant, not perhaps on grounds of pure logic, but simply for practical reasons " : *The Liesbosch* [1933] A.C. 449. This remark refers to consequences, but applies with equal force to causes. In this connection, however, it hardly does the law justice to say that the choice is made " for practical reasons." We want to know what the practical reasons are, and Lord Wright himself gives the answer in *McLean* v. *Bell* (1932) 147 L.T. 262, 264, where he says : " The decision . . . must turn not simply on causation but on responsibility." Earlier Lord Sumner had said : " The object of a civil inquiry into cause and consequence is to fix liability on some responsible person " : *Weld-Blundell* v. *Stephens* [1920] A.C. 956, 986.

What is the meaning of these dicta? They cannot mean, as some people have thought, that we must jettison the notion of causation altogether and substitute a vague and mysterious test of " responsibility," with or without the unilluminating addition of " on practical grounds." On the contrary, they retain the principle that the causes of the accident must be ascertained, but narrow down the choice to " responsible causes." Among the physical causes of an accident—which may be many and varied—we must select those which can be traced to the act or omission of a human agent. Thus we can dismiss at once such factors as fog drifting across a road, unless it happens to be fog artificially created by a near-by factory, as in *Holling* v. *Yorkshire Traction Co. Ltd.* [1948] 2 All E.R. 662.

A causal sequence can be traced to a human act if that act has set it in motion—for instance, by moving the helm of a ship, whereby its course brings it into collision with another ship. An omission creates more difficulty : but where, as in the case of an unfenced machine, the fitting of a fence would have removed the danger, the continued movement of the machine in a dangerous and exposed manner can be traced back to the omission to fence. The essence of the matter is the continuance of a dangerous factor in the situation by omission to control it : *Biddle* v. *Truvox, etc.* [1951] 2 T.L.R. 968.

To trace the human causes of an accident, however, is not enough. The court has to decide which of the acts or omissions were culpable, as being either wilful or negligent (or in breach of statutory duty). This is often the hardest problem. In *Cork* v. *Kirby Maclean, supra*, for instance, the workman's epilepsy was incontestably one of the causes of the accident, but the Court of Appeal differed from the lower court in holding that the workman was negligent in going onto the scaffold with knowledge of his condition. So, too, in such cases as *Harvey* v. *Road Haulage Executive, supra*, undoubtedly the presence of a stationary vehicle was one cause of the accident : the question was whether in the

circumstances it was culpable to leave the vehicle stationary. In both these cases the courts used language which suggested that they were looking for the "causes" of the accident: but the question they were really deciding was, which of the causes are culpable?

It is important to note that culpability may vary as between different parties. Thus where goods are stolen from a warehouse, one would say at first sight that the thieves are alone responsible: and yet, in an action by the owners, the warehouseman may also be held responsible for his negligence.

It may be objected that this three-stage inquiry is elaborate and artificial. But it is exactly what happens when there is a public inquiry into such a disaster as the loss of a ship or an aircraft, or the derailment of a train. Invariably the court of inquiry begins by determining all the causes of the disaster—which are usually numerous; then it traces some of them back to human agents; and finally it allots blame to these human agents, or acquits them of responsibility. The same process occurs in civil actions, but it is somewhat masked by the fact that the issues are limited by the pleadings. In fact the suggestions which are here offered give a sound basis in principle for what is done every day in practice.

Cause and condition sine qua non. Whether the distinction between cause and condition adds anything helpful to the foregoing analysis is doubtful: but perhaps the better view is that the distinction is sound and valuable, and has been given a bad name by repeated misapplications. At any rate the distinction was recognised in *Jones* v. *Livox*, so it is desirable to comment on its meaning and limitations. (It was also explained by Denning J. in *Ministry of Pensions* v. *Chennell* [1947] 1 K.B. 250.) A condition *sine qua non* resembles a cause to this extent, that the accident could not happen without it: but it is no more than the setting of the stage, and is not one of the factors which brings about the accident.* Thus motor-cars could not collide unless there was a road for them to collide upon, nor could unfenced machinery cause injury unless there was a floor for the machine and worker to rest on: but no one would suggest (except, perhaps, the philosopher quoted by Professor Glanville Williams) that the road or floor, by its mere presence, was in any sense whatever a cause of the accident. A more difficult problem arises when a human agent has full knowledge of a potential danger and also the ability to avoid it, as when an approaching motor-car collides with a stationary car on a straight road in broad daylight. It could be argued that the stationary car was a condition *sine qua non* and

* "Part of the history," Denning L.J. says. See also the remarks of Lord Asquith in the *Stapley* case, and the recent example of a condition *sine qua non* in *Norris* v. *Moss & Sons, Ltd.* [1954] 1 All E.R. 324.

the approaching car the cause of the accident: but it seems more accurate to say that while both were causes of the accident, the approaching car was culpable and the other was not.

Remoteness. It would be inappropriate at the end of a short note to embark on a discussion of remoteness of causation, misleadingly called remoteness of damage. Two brief thoughts may, however, be put forward. There arrives a time after an accident when it and its causes have become no more than the setting of the stage, on which something new intervenes. If this is so, then the idea of *nova causa interveniens* is only the distinction between cause and condition, applied at a later stage. The other thought is that the maxim *causa proxima non remota spectatur* may lead us, wrongly, to dissect a continuous causal sequence at an isolated point. We ought instead to think in terms of a causal sequence (a more accurate term than the metaphorical "chain") which continues uninterruptedly by virtue of its internal dynamism until brought to an end by something "ultroneous," as Lord Wright would call it. Thus, to take a simple example, there are quite a number of events between the navigator's order and the resulting collision—the movement of the helmsman's hands, the helm itself, the communicating mechanism, the rudder, and the bows of the ship, first changing direction and then cleaving through the water in the new direction to collide with the other ship; but there is a single sequence in which no external factor intervenes, and consequently the ship is liable for the damage. If the inquiry were limited to the *causa proxima* we could look only to the final movement of the bows of the ship to cut into the damaged vessel—which would be absurd.

The use of the term "direct" cause in *Re Polemis* [1921] 3 K.B. 560, could be misleading, since in fact there was a whole sequence of events: the movement of a workman, the fall of a plank into the hold, the striking of a spark, the ignition of the ship. If, however, the word "direct" is understood to mean an uninterrupted sequence of causes not diverted by an "ultroneous" factor, the difficulty vanishes, but leaves, of course, the problem of deciding what is "ultroneous."

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TRADE CONSPIRACIES

An Historical Footnote

Did Lord Campbell decide, in 1852, that a combination or ring of booksellers and publishers, which kept up the retail prices of books, was an illegal or criminal conspiracy?[1] The precise answer to this question is of no great moment. But it does help to document the attitude of the law towards combinations and conspiracies in restraint of business competition in the middle of the nineteenth century. This, and the interest of the episode in which Lord Campbell figures, must be the excuse for this short note.[2]

For several years before 1852 (probably from 1848), a Booksellers' Association in London had succeeded in controlling the retail prices at which the books of a group of influential publishers were sold to the public. The Association worked in collaboration with the publishers in question; according to the publishers, they had agreed to co-operate at the request of the booksellers. The publishers refused to supply their books on trade terms (or sometimes on any terms) to booksellers who were engaged in "underselling."

About 1851 the workings of the combination became the subject of strong public censure. Because of numerous adverse criticisms, the publishers and the Booksellers' Association decided to submit their arrangements to the scrutiny of a panel of "eminent literary men"; and they agreed to act in accordance with the findings of the panel. Several of the country's "principal authors" were invited to serve. In the event three agreed to examine the price regulations. They were Lord Campbell (author of *Lives of the Lord Chancellors, etc.*), the Dean of St. Paul's, Dr. Milman (author of *History of Latin Christianity*), and George Grote, banker and scholar (author of *History of Greece*).

[1] The common view seems to be that Lord Campbell decided that it was an illegal or criminal conspiracy; see, for example, Sir. F. Macmillan, *The Net Book Agreement* (1924), p. 2; E. T. Grether, "Resale Price Maintenance in Great Britain," *University of California Publications in Economics*, Vol. 11 (1935), p. 267; M. Plant, *The English Book Trade* (1939), p. 439; W. A. Lewis, "Monopoly and the Law," *Modern Law Review*, Vol. VI, p. 98; and C. Morgan, *The House of Macmillan* (1943), p. 178.

In this note it is suggested that this view is incorrect. The correct view, that Lord Campbell did not declare the combination to be illegal, is stated, for example, in a letter of G. B. Bowes in *The Bookseller*, January 20, 1933, p. 73.

Sir F. Macmillan was not entirely consistent in his interpretation of Lord Campbell's views. Although he stated that Lord Campbell had called the combination an illegal conspiracy, elsewhere in the same book, reprinting an address delivered by him in 1898, he observed that the failure of the combination was due to "the faint-heartedness and want of pluck of the publishers."

[2] This note is based on reports, leading articles and correspondence in *The Times*, March to June, 1852.

The panel met representatives of the Association, the co-operating publishers and the underselling booksellers. The principal undersellers made it clear that they were not prepared to abide by the decisions and recommendations of the panel. The proceedings therefore cannot be regarded as an arbitration. Further, it was not the intention of the parties who "appointed" the panel that a decision on the law would be handed down. The panel was appointed on the basis of the literary attainments of its members, and not on the basis of their experience and learning in the law. The inquiry was not a judicial inquiry. In the "decision" of the panel, given by him in May, 1852, Lord Campbell prefaced his remarks with the observation: "We having been solicited to act as referees in this matter, have not hesitated to do so, in the hope of rendering some service to the cause of literature. No question is put to us of law or morality. We are merely requested to say what, in our opinion, is reasonable and expedient."

In the "hearings" before the panel the question of the legality of the arrangements was raised only once. A leading underseller, of the firm of Bickers and Bush in Leicester Square, expressed the view that associations which endeavoured "by combination to enforce higher prices than would otherwise exist," and the regulations of which "could not be enforced in courts of law," were "illegal as well as impolitic." To this Lord Campbell replied: "Oh, no! they are not illegal, Mr. Bickers. They do not force you by any violence or threats." It was agreed by all parties that there was "coercion" in the sense that undersellers were implicitly threatened with the cutting off of supplies of books and the consequential loss of business. But Lord Campbell did not regard such "coercion" as illegal. In his "decision" he implicitly made a distinction between the "employment of physical force or threats, which the law forbids," and the "coercion" which he and his fellow-members thought had been present.

The three authors found that the resale price regulations were "unreasonable and inexpedient," ". . . indefensible, and contrary to the freedom which ought to prevail in commercial transactions." They held that, unless a strong case could be made out that the book trade should be treated as a special exception, it was desirable in the general interest that commerce should be free. They were not satisfied that there was such a case, and consequently recommended that the regulations should be withdrawn. The publishers acted accordingly. Free trade in the retailing of books was restored. The matter had been settled according to the tenets of political economy and not on points of law.

Any doubts about the meaning of the "decision" (which is clearly worded) must be dispelled by the immediate sequel. Many members of the Booksellers' Association not unnaturally were dissatisfied with the verdict and its consequences. The verdict was freely criticised on the grounds, for example, that the panel was

swayed by poor arguments, that its members knew little "about the practical operation of the bookselling trade," and that they were "all possessed with a sort of popular, vague, and general—and in this case unjust—notion of what was called free trade." Some wanted to reintroduce arrangements like those condemned by the panel—a clear indication that, with Lord Campbell, they did not think that the arrangements were illegal. But the publishers did not change their decision.

Far from providing authority for the view that trade combinations were regarded as illegal conspiracies in 1852, the events and "decision" point to the opposite conclusion.[3] Moreover, for several decades before 1852 there does not seem to have been any decided case in which it was adjudged that combinations to fix prices, or to fix resale prices, were illegal or criminal conspiracies. There have been no such cases or decisions since 1852. Yet in the second half of the nineteenth century the view was sometimes expressed in commercial circles that price-fixing combinations might possibly be held to be illegal conspiracies. Perhaps early misunderstandings of Lord Campbell's verdict were in part responsible for the doubts. These should have been dispelled by the decision in *Mogul Steamship Company* v. *McGregor, Gow & Co.* in 1892,[4] which made it clear, in the words of a contemporary commentator, that ". . . the old high common law doctrine of conspiracy, if we may so call it, is no longer tenable, if it ever was."[5]

B. S. Yamey.*

[3] Another indication of Lord Campbell's views may be found in the report in 1855 of *Hilton* v. *Eckersley*, 6 El. & Bl. 47. Crompton J. had stated that combinations which tended "directly to impede and interfere with the free course of trade and manufacture" were in his view "illegal and indictable at common law." Lord Campbell expressed his disagreement with this dictum. He was not prepared to say that the disputed arrangements before the court were "illegal at common law," or that the parties to the arrangements were "liable to an indictment for a conspiracy." On the other hand, he held that the disputed agreement "cannot be enforced by action, being considered void as against public policy." He did so with reluctance and apprehension, because "different generations of judges, and different judges of the same generation, have differed in opinion upon questions of political economy and other topics connected with the adjudication of such cases."

[4] [1892] A.C. 25.

[5] "Notes," *Law Quarterly Review*, Vol. VIII (1892), p. 101. Price agreements among business firms were not unknown before the *Mogul* decision. But the first combination, after 1852, of manufacturers and distributors to maintain *resale* prices was formed after the *Mogul* decision. The supporters of the first resale price maintenance association referred to that decision to demonstrate that the arrangements did not constitute an illegal conspiracy.

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STATUTES

Merchandise Marks Act, 1953

The signal inadequacy of the common law relating to " puff " and to misrepresentation, with its restricted definitions and remedies, has resulted in important developments, both legal and extra-legal, against the unscrupulous or over-ingenious use by traders and manufacturers of false or misleading descriptions of commodities.

Thus, there have grown up various organisations, whose work, though often in different fields, has the common end of establishing acceptable standards of quality and of commercial integrity. There is, for example, the British Standards Institution, whose primary concern is with the standards and the craftsmanship of the manufacturer. There is the Good Housekeeping Institute, whose Seal, attached to goods that pass appropriate tests, " guarantees " to the shopping public the quality and performance of those goods. For the would-be buyer of a second-hand car, there is the Automobile Association Advisory Service, which is prepared, through expert reports to the buyer, to throw light on the darker places of a used car's condition. Finally, one may mention the Retail Trading Standards Association, which, financed by manufacturers and traders, helps to enforce the existing law against the small margin of persons whose lack of good faith in production and trading methods tends to impair the good name of industry and commerce in the domestic market, and the reputation of British craftsmanship and fair dealing in the world as a whole.

For, now, a very considerable body of statute law exists through which Parliament has sought progressively to regulate, in particular, the descriptive statements applied to the general range of commodities. Among these statutes are included especially, for the present purpose, the Merchandise Marks Acts, 1887–1953, which regrettably are not yet in consolidated form.

The principal Act of 1887 was aimed (*inter alia*) at trade descriptions, false in a material respect and applied to any goods, which relate to number, quantity, measure, gauge, or weight, to the mode of manufacture or production, or to the material of which the goods are composed. The 1887 Act did not deal with descriptions that are simply misleading; it did not cover false descriptions of quality or performance; it was directed, by and large, at descriptions as to the contents or composition of goods. There was, for instance, a breach of the Act where a 34-gallon cask of beer was described on the seller's invoice as a " barrel," which, in the beer trade, was of 36 gallons capacity (*Budd* v. *Lucas* [1891] 1 Q.B. 408); or, again, where American hams were sold and

described in the invoice as "Scotch hams" (*Coppen* v. *Moore* (*No.* 1) [1898] 2 Q.B. 300); or where linen substantially mixed with cotton was described as "linen": *Deimel Fabric* v. *Middleton* (1904) 48 S.J. 476.

Further, the coverage of the Acts was, and is still, closely circumscribed by the requirement that the description must be "applied" to the goods in question. Even after the amendment introduced by the Patents, etc. (International Convention) Act, 1938, s. 10, the definition of "applied," as will be explained presently, probably remains very narrow.

Violation of the Acts may, on prosecution, be punished by certain specified penalties, including, before 1953, a maximum fine of £20, on a first summary conviction, and, on a second, a maximum fine of £50. But, with regard to ensuring the prosecution of offences, the Merchandise Marks Acts were and remain on the weak side. The only official machinery of enforcement is constituted by the fact that the Board of Trade may be moved on application to prosecute, subject, however, to the fulfilment of certain preconditions: the prosecution must appear to the Board to affect the general interests of the country, or of a section of the community, or of a trade (1891 Act, s. 2), and, on reviewing the evidence contained in an application, the Board must be satisfied that there would be a reasonable prospect of a conviction (B.O.T. Regs. of July 7, 1913, printed in S.R. & O. 1929, p. 1436). B.O.T. prosecutions have averaged only about two a year since 1887. For the most part, the trouble and expense of enforcing the Act has been left to injured parties, interested business firms, "common informers," interested trade protection associations and fair trading associations, like the Retail Trading Standards Association.

The precipitating cause of the Act of 1953 was the abolition of the Utility Scheme. Other more fundamental causes have been (a) the vast growth of branded goods on the market, which has forced the customer increasingly to rely on the integrity of the remote manufacturer, distributor and advertiser rather than on the judgment of a known retailer, (b) the chemical revolution that has produced a host of valuable, synthetic substances, which afford new opportunities for deceptive "sales talk" regarding quality, performance and behaviour, (c) a public grown much more quality-conscious through, among other reasons, the cumulative effects of better educational opportunities, magazine and feature programmes of the B.B.C., the better women's magazines, and the work of organisations like B.S.I. and the Council of Industrial Design, and (d) the new emphasis in advertising on quality and performance as well as on contents and composition of commodities.

Among the minor provisions of the new Act, one need only mention here that the maximum fine on a first summary conviction has been raised to £100, and, on a second, to £250, and that trade marks containing a descriptive element are expressly

excluded (s. 1 (4)). The major changes made are twofold: first, and very important, the Acts now extend to "misleading" trade descriptions as well as descriptions false in a material respect, and, second, the definition of a trade description for the purpose of the Acts has been considerably enlarged. Trade descriptions now include "any description, statement, or other indication, direct or indirect,

(aa) as to the standard of quality of any goods, according to a classification commonly used or recognised in the trade, or

(ab) as to the fitness for purpose, strength, performance or behaviour of any goods."

The new law is not intended to catch what is known as the "legitimate" or "genuine" trade puff, that is to say, the vague, unspecific "back slapping" in praise of an article that is frequently found couched in superlatives. "Beer is best," "Guinness is good for you," the Rolls Royce is "the finest car in the world," "There is no substitute for wool." Such statements as these, it is thought, remain lawful in any case.

But, once the description of quality, and perhaps more importantly, performance, behaviour, strength or fitness for purpose becomes more specific, the new law is attracted. "Non-creasable," "fade-proof," "unshrinkable," "mothproof," "waterproof," of clothes and other fabrics, "silent," of a typewriter, "heat-resisting," of glass, "shockproof," of a screwdriver, "accurate," of a timekeeper, "kissproof," of lipstick, "full fruit standard," of jam, "new laid," of eggs, "unbreakable," of toys, all these and similar expressions may now be open to challenge. It may be submitted that, while some, like "heat-resisting," of glass, and "unbreakable," of toys, should be tested in a relative sense, others, like "mothproof," ought to be taken literally.

Thus, a cooking dish described as "heat-resisting" performs properly if it does not crack in the domestic oven: it need not resist the temperatures of a blast furnace. But, a toy that breaks after a reasonable period of wear and tear in normal play is merely "strong," not "unbreakable," though it is not to be expected to endure the considered attack of an adult. On the other hand, "mothproof" fabrics are either proof against moths or not. If they are not, the description should be unlawful under the new Act.

Attention may also be paid now to the subtler or more suggestive type of description or statement. Does the new Act outlaw the selling technique that accompanies a description of certain tablets with some such testimonial as, "At 76, I am experiencing the joys of life to the full"? How does the new Act affect those advertisements that play on the human desire not to be shunned by one's fellow man, as in the case of certain deodorants and ointments? And, what of "night starvation"? Clearly, an

extensive field of competitive advertising and high-pressure salesmanship may now be on the verge of occupation by the law.

But, the revised scope of the Merchandise Marks Acts should not be exaggerated. As already mentioned, the Acts control trade descriptions only when they have been "applied" to goods in any of the ways enumerated in section 5 of the 1887 Act, as amended by section 10 of the 1938 Act. The Acts do not generally govern a purely oral trade description: *Coppen* v. *Moore* (*No.* 1), *supra*, 304; *Langley* v. *Bombay Tea Co.* [1900] 2 Q.B. 460; *cf. Cameron* v. *Wiggins* [1901] 1 Q.B. 1. Hence, radio advertising would not be subject to the Acts, and advertising on commercial television will not be controlled by the Acts so far as it is merely spoken.

As to written or pictorial advertisement in the press or magazines, or on television or posters, the whole tenor of section 5 is that the written or pictorial trade description must be found in some close juxtaposition with the article sold. Thus, although section 5 (1) (*d*) might superficially be considered wide enough to take in press and similar advertisements, it is probably, in law, confined to such descriptions as actually appear on labelled goods or, say, in an invoice sent with goods or a little later (as, *e.g.*, in *Budd* v. *Lucas*, *supra*): for one thing, if subsection (1) (*d*) had embraced general advertisements, the amending subsection (2A) would have either been unnecessary or taken a different form.

The amending subsection (2A) itself operates only where goods are delivered "in pursuance of a request made by reference to a . . . trade description appearing in any sign, advertisement, invoice, wine list, business letter, business paper or other commercial communication." The words, "or other commercial communication," construed *ejusdem generis*, are clearly confined to written communications. This subsection's most significant area of operation is in the mail order business, where the request by reference to the advertisement is normally made. But, outside this kind of business, it may be suggested that only the very rare customer will request an article with reference to an advertisement she or he saw on television or in the press. When, in addition, it is recalled that the Merchandise Marks Acts are an example of penal legislation and are, therefore, to be restrictively construed in case of doubt, the possibility that they extend to written and pictorial advertisements generally becomes extremely remote.

But, limited in scope though the Acts may be, it is hoped that the Board of Trade will pursue a more vigorous policy of prosecutions than in the past in administering the new provisions. The interests alike of honest traders and manufacturers and of the shopping public deserve this, and the Board's terms of reference in the 1891 Act surely confer upon it a wide enough discretion.

C. Grunfeld.

The Regency Act, 1953

It is a remarkable fact that until 1937 no permanent statutory provision was made either for a regency in the event of the sovereign's being incapable of personally performing the royal functions or for the delegating of such functions during temporary absence or illness. This is in marked contrast to the elaborate provisions on this subject in certain foreign constitutions (*e.g.*, that of the Netherlands). The disadvantages of this situation were observed when the dying George V had to hold a council and tax his ebbing strength to sign letters patent appointing Counsellors of State : an event which led to the passing of the Act of 1937, which attempted to lay down permanent rules on this subject. Like so many statutes relating to the Royal Family its drafting was by no means perfect and this is well demonstrated by the fact that the brief span of years since 1937 has seen two different amending Acts, the more recent one being that now under consideration.

The new Act represents in part a reversion to the older policy of making *ad hoc* arrangements in each successive reign, as with one exception its provisions relate only to certain living members of the Royal Family. On their deaths or the ending of certain minorities, the 1953 Act will expire and the Act of 1937 (as amended in 1943) will alone remain. The exception is the interesting permanent provision in section 2 that " the heir apparent or heir presumptive to the Throne shall be deemed for all the purposes of the Regency Act, 1937, to be of full age if he or she has attained the age of eighteen years." This means that, *e.g.*, the present Duke of Cornwall could be Regent at eighteen years of age if a regency were then to become necessary. The Act of 1937 had required (s. 3 (2)) the Regent and Counsellors of State to be twenty-one years old, notwithstanding the fact that the monarch can act in person at eighteen : s. 1. This meant that the temporary and limited responsibilities of a Counsellor of State could not be borne by one who might next day bear the Crown itself. Accordingly the 1943 Act allowed the heir to the Throne to be a Counsellor at eighteen. But where the Regent is not the heir (as may well occur) he or she must still be twenty-one.

The main purpose of the Act is not, however, to make this permanent change in the law, which is not a matter of any urgency, but to allow the present Queen's husband to act as Regent in certain circumstances in preference to the persons entitled to that office under the 1937 Act. It is naturally thought that the father of a young sovereign should rule on his or her behalf and the personal qualities of His Royal Highness make this eminently desirable. If a Regency becomes necessary under the 1937 Act on the succession to the Crown of a child of Her Majesty while still under eighteen, the Duke of Edinburgh, if living, is to be

the Regent: s. 1 (1). If a Regency becomes necessary for any reason during Her Majesty's reign, the Duke is to Regent unless, or (as the case may be) until, there is a child or grandchild of Her Majesty who can be Regent under the combined provisions of the 1937 and 1953 Acts: s. 1 (2). These provisions are to take effect subject to the rules of the 1937 Act as to disqualifications to act as Regent and so on. Thus, if the Duke of Edinburgh became a Roman Catholic he would thereby be disqualified from being Regent.

Some of these consequential provisions adopt the curious and probably undesirable practice of explaining the effect of sections of the 1937 Act. Thus section 1 (3) (*a*) mentions "subsection (2) of section 3 of the Regency Act, 1937 (which enumerates the disqualifications for becoming a Regent)" and section 4 (2) after deleting certain words from the 1943 Act adds "(being words rendered unnecessary by section 2 of this Act)." Such explanations seem quite superfluous and create a precedent likely to lengthen repealing or reference sections in other Acts, to say nothing of the danger of error and consequent confusion. Thus section 2 (3) of the 1937 Act enumerates not merely the disqualifications for becoming Regent, but also those—which happen to be the same—for remaining Regent.

The choice of Counsellors of State by the 1937 Act was made very rigid. Before it the monarch had a free discretion. The disadvantages of such rigidity have been often felt. The five persons mentioned in the Act (s. 6) had until 1943 to be appointed even if they were going to be overseas with the sovereign. The 1943 Act (s. 1) allows the names of those so absent to be omitted, but does not allow any other names to be substituted: a rule which prevents the Royal Family from all being overseas at once. Nor is there any possibility of omitting the name of someone who, although not absent from the realm, is by ill health or otherwise not available for the discharge of a Counsellor's functions. The new Act does not unfortunately alter this rigidity. It merely allows the present Queen Mother to be named as an additional Counsellor of State: s. 3. Sooner or later, it is suspected, yet another Regency Act will be needed to give the sovereign a free discretion to appoint within the Royal Family or possibly to take the four adults nearest to the succession who are in fact available to act. This would make it possible to appoint members of the Royal Family as Governors-General of the Queen's other realms more frequently than can now be done. It will be recalled that in 1947 H.R.H. the Duke of Gloucester had to return from his post in Australia to serve as a Counsellor of State. Such things could be avoided by a slightly less rigid selection system.

This leads one to consider the suggestion of Mr. P. C. Gordon-Walker, M.P., that the Queen should appoint a Governor-General in the United Kingdom during her absence rather than Counsellors

of State. This idea is attractive in that it would re-emphasise the equality of the member nations of the Commonwealth. It is no objection that there is a Governor in Northern Ireland (as has been somewhere suggested), for the Governors of the Australian states coexist with the Governor-General. Nor is the task of representing the Queen in the United Kingdom necessarily heavier than that in the other realms. But with all this every traditionally-minded citizen of this country (as most of us are at heart) would be aghast at the idea of being ruled, even temporarily, by a non-royal individual. If the Governor-General were by law required to be a member of the Royal Family, the situation might be better, but then an "inequality" with the other realms would still exist. The Counsellors of State system enables a young prince or princess to act with a parent or older relative and so breaks them in comparatively gently to their great responsibilities. Another point is that not all the member nations of the Commonwealth have Governors-General : India has a President. Why should the United Kingdom not continue to be in this one small and highly picturesque particular *sui generis*? Or it might be possible when the young princes of Gloucester and Kent, as well as Her Majesty's children, are of age, to send two or three members of the Royal Family to each of the realms in turn, thereby enabling them to experience the Counsellors of State system. Mr. Gordon-Walker's suggestion has the merit of logicality. But that is a merit which has never greatly appealed to the British nation.

C. d'Olivier Farran.

NOTES OF CASES

Mariage de Convenance

"If the present case were devoid of the element of fear, I should be compelled to find that the parties to the present suit intended that the petitioner should become the wife of the respondent," said Karminski J. in *H.* (*orse. D.*) v. *H.*[1] But in the event he held void an unconsummated marriage which had been contracted in 1949 in Communist-dominated Budapest between a Hungarian girl of eighteen and a French citizen some six months her junior, although the marriage was valid as to form by Hungarian law.

The woman gave evidence that she went through the ceremony solely to obtain a French passport, which would enable her to leave Hungary, where she went in fear for her liberty or chastity under the Communist régime. It was the understanding of both parties that the marriage was one of convenience only; they never intended to live together and they never did live together. Two months after the ceremony the wife, having obtained her French passport, left Hungary; the husband also left and returned to France. Letters he wrote between 1951 and 1953 made it clear that he regarded his marriage was at an end and was anxious to have it annulled or dissolved.

Jurisdiction appears to have been assumed on the basis of the petitioner's domicile. The Attorney-General and the Queen's Proctor having agreed with counsel for the petitioner that either English or Hungarian law was applicable, Karminski J. decided that the choice between them on the question of duress was "almost academic" and proceeded to apply a version of the English law of duress for which there appears to be no precedent.

It may be useful to consider how far the decision might have been the same if the circumstances up to the time of the end of the marriage ceremony had been unchanged, but thereafter the parties had changed their minds and lived together, and one of them subsequently opposed a declaration of nullity. Could the husband, for example, in such circumstances have avoided the marriage and rid himself of the liability to support the woman and any children of the union? The general theory of the law is that the validity of a ceremony of marriage is not affected by any subsequent event. An exception appears in the form of decree of nullity for wilful refusal to consummate the marriage but that this exception is apparent only was recently emphasised again by Lord Goddard C.J. in *R.* v. *Algar*.[2] It is also of the essence of the marriage relation

[1] [1953] 3 W.L.R. 849.
[2] [1953] 2 All E.R. 1381, 1384. See also *Re Eaves* [1940] Ch. 109.

that, once it is validly established, the parties cannot by agreement effect its annulment or dissolution.

None of the authorities cited in the case appears very relevant or helpful to the decision, since admittedly there was no precedent for the annulment of a marriage on the grounds of fear or duress emanating other than from the other party. The case was put of the effect of an announcement by the Hungarian authorities before the ceremony that all single women would be put into brothels, but such a case seems not parallel, since it postulates the threat of some definite action. Indeed all the previous cases on duress appear to have involved the threat of specific action, and a vague and general fear of unpleasant consequences appears never to have been successfully pleaded before. In this case, on the other hand, the evidence was that the girl had survived the Soviet occupation and some years of the Communist régime without loss of chastity or liberty, and no evidence was adduced of a definite threat to either. Again, where does one draw the line? Fear of social obloquy would scarcely be sufficient to invalidate a marriage celebrated under the threat of it, nor fear that the woman's child will be born illegitimate. Would fears for liberty alone suffice? Suppose a man marries a woman to prevent her testifying against him on some criminal charge, can he later avoid the marriage?

In sum, it would seem that this is the hard case that makes bad law. The girl preferred marrying a foreigner, on an understanding that there would be no subsequent cohabitation, to remaining in Hungary. So be it. There seems no compelling reason why, once in comparative safety, she should be permitted, having escaped the greater evil, to avoid the lesser. It may, however, be relevant that, assuming the validity of a marriage, English law insists upon a matrimonial offence before granting dissolution. Two other women gave evidence in the case that they had in similar circumstances contracted similar marriages; both of these had subsequently been dissolved. The report does not specify where they had been dissolved or whether any question of collusion might arise, and it may well be that consideration of this difficulty coloured the decision.

It may, perhaps, be hoped that the judges will in future more severely limit the warping effects on the English law of marriage of conditions in the iron curtain countries. Now that some of the dust has settled, relief may perhaps be expressed that the majority of the Court of Appeal held that the Soviet marriages in *Kenward* v. *Kenward*[3] were invalid on the ground of defect of form, and that the sweeping theories of mistake adumbrated in that case have not found their way into English marriage law.

O. M. Stone.

[3] [1951] P. 124.

Delayed Marriages

That a marriage is formally valid if it complies with the requirements as to form of the law of the place of celebration is well settled, and fortunately the House of Lords have, in *Starkowski* v. *Attorney-General*,[1] upheld Barnard J. and the Court of Appeal[2] and refused to disturb this principle even where the law of the place of celebration provides for the retrospective act of validation. If difficulties such as those which arose in *Chapelle* v. *Chapelle*[3] are to be avoided, it is important that formal validity should be upheld even where the application of the *lex loci celebrationis* may conflict with presumptions such as that against retrospective legislation. Although the case resulted in the refusal of a declaration of legitimacy, the presumption in favour of legitimacy was in no way infringed by the presumption in favour of the validity of marriage, since of a woman's two children by different fathers one at least was indubitably illegitimate, and in declaring the bastardy of the younger the House of Lords in fact upheld the legitimacy of the elder.

The facts of the case reflect the chaos and uncertainty introduced into the lives of individuals by the breakdown of law and order, in this case in the immediate post-war period in Europe after the National Socialist domination had been ended but before its replacement by an ordered system of government. Under the German Marriage law of 1938, a civil ceremony was made compulsory in German-occupied Austria for a valid marriage. W and H, both Roman Catholics domiciled in Poland, found their way to Austria in 1945. W was then pregnant by H and the parties wished to regularise the position by marriage. There being difficulties about a civil ceremony, they asked the local priest of the Roman Catholic church to perform a ceremony of marriage in accordance with the rites of that Church. At first he refused but, in the confused situation arising from the expulsion of the Germans, he subsequently performed the ceremony in May, 1945. On June 12, 1945, a daughter was born. On June 30, 1945, an Order of the Austrian Government came into effect according to which marriages celebrated by the religious authorities between April 1, 1945, and June 30, 1945, would, on registration with the civil authorities, be validated as from the date of the religious ceremony. Had the marriage of W and H been registered immediately, its validity and the resultant legitimacy of D, which was its object, would hardly have been disputed. But by some error the religious ceremony was not registered until July, 1949, and it was not disputed that until that date W and H would not have been considered married by Austrian law.

[1] [1953] 3 W.L.R. 942.
[2] [1952] P. 302.
[3] [1950] P. 134.

H and W in fact left Austria together in July, 1945, and reached England in the autumn of 1946. They parted finally in 1947, having undoubtedly acquired a domicile of choice here, and in March, 1949, W gave birth to S, a son of whom F was the father. W did not receive any notification of the registration in Austria in July, 1949, of her union in religious form with H, and in February, 1950, she once again made an attempt, in this instance even more belated, to regularise the *de facto* position and went through a civil ceremony of marriage in England with F, then a bachelor. In due course S petitioned for a declaration of his legitimation under the Legitimacy Act, 1926, by the subsequent marriage of his parents in 1950, and this was refused on the grounds that, at the time of the ceremony in February, 1950, W was incapable of marrying F, and that she was then the wife of H.

A valuable aspect of the decision was the indication that the English courts will, in general, be prepared to extend to other countries the jurisdiction in matrimonial causes that they claim for themselves. Thus Lord Tucker stressed that a large number of statutes retrospectively validating marriages already performed had been passed in this country, and that their operation had in no instance been restricted to persons domiciled in England. Lord Cohen's discussion of status, on the other hand, appears to illustrate once again the unhelpfulness of this concept in deciding questions such as that before the court. On the other hand, all their Lordships, with the possible exception of Lord Reid, expressly reserved for consideration in a subsequent case the situation that might have arisen had the later ceremony with F in England come before the registration validating the former ceremony with H in Austria.

O. M. Stone.

Issues as to Paternity

Of all the social changes of this century possibly the most far-reaching is that which has come about in the relations between husband and wife. Yet the courts are not infrequently precluded from giving effect to the realities of modern conjugal existence.

Such a case is *Watson* v. *Watson* [1953] 3 W.L.R. 708, decided recently by Mr. Justice Barnard.

On an application by a divorced wife for maintenance for the child of her former marriage the ex-husband denied the paternity of the child. The child had been born on December 11, 1946, and the husband gave evidence that he was almost certain that he had had sexual intercourse with his wife on March 5, 1946, but that he had used a rubber sheath. In fact, throughout their married life contraceptives of one kind or another had been used either by the wife or the husband.

Mr. Justice Barnard said that " the husband was a thoroughly honest, straight-forward witness " and he saw no reason to doubt his evidence; the wife, on the other hand, was someone who would say anything to suit her own purposes and who did not seem to mind much whether she was saying it on oath or not. It was impossible to rely on anything she said. Yet, continued the learned judge, " the fact that I entirely believe the husband and completely disbelieve the wife does not, unfortunately, decide the issue. What I am dealing with here is the legitimacy or illegitimacy of a child, and the law is very strict about these matters. The law is just the same today as it was at the time of *Gordon* v. *Gordon and Granville Gordon* [1903] P. 141 " (at p. 712).

Mr. Justice Barnard then quoted from the judgment in that case of Sir Francis Jeune P., who was in turn quoting from a text-book written in the year 1836 : " Sexual intercourse between man and wife must be presumed, and nothing, except evidence that the husband did not have such intercourse at the period of conception, can illegitimise a child born in wedlock. If the husband could, from circumstances of time, place, and health, have had nuptial intercourse with his wife, and there be no evidence to prove that he did not have such intercourse, he must be considered the father of her child, even if she had committed adultery with one, two or twenty other men " ([1903] P. 143).

Mr. Justice Barnard admitted that since 1903 the use and knowledge of contraceptives had become more common, but he did not feel that this use in any way altered the proposition of law propounded one hundred and seventeen years ago.

The result was that although Mr. Justice Barnard's own preference would have been to decide in the husband's favour on the balance of probabilities, in the face of the presumption of law he was impelled to find against him.

With the greatest respect to the learned judge, this seems an unfortunate decision. It is always most unsatisfactory when a legal rule no longer in accord with the realities of modern existence is allowed to overweigh a judge's own view of the truth of a case on a pure question of fact. One such anachronistic technicality was removed when the rule in *Russell* v. *Russell* was abolished, but it seems that another still survives to prevent the truth from prevailing.

It may, however, be argued that the justification of the rule in *Watson* v. *Watson* is that it is designed for the protection of the child whose interests are paramount. But it will nevertheless not, as that case shows, necessarily protect him from whatever stigma still attaches to those whom the world believes to be born out of wedlock, although admittedly it may safeguard him financially. For the payments that can be obtained for the maintenance of an illegitimate child under an affiliation order against his putative father are derisory in comparison with those obtainable in respect

of a child of a marriage. Indeed, in the circumstances of *Watson* v. *Watson* it seems that, on the existing state of the law, the mother could not be regarded as a " single woman " so as to be able to recover anything at all from the putative father.

But all this can hardly be regarded as a moral justification for forcing the husband to pay for the maintenance of a child that no-one believes to be his. The existing state of the law of bastardy aggravates a social problem which is evaded, rather than solved, by this technical rule of evidence, a rule which is itself liable to create a burning and justifiable sense of grievance.

FENTON BRESLER.

MISTAKE AND RECTIFICATION IN CONTRACT

THE remarks of Denning L.J. in *Frederick E. Rose (London), Ltd.* v. *William H. Pim, Ltd.* [1953] 2 Q.B. 501 are probably the most forcible expression of the " objective " theory of contract that have yet fallen from an English judge. The actual decision, however, did not raise this problem. B agreed to buy horsebeans from S on S's representation (incorrect as it turned out) that horsebeans were the commodity known in Egypt as " feveroles." It was held by the Court of Appeal that B could not claim rectification, because both the oral and the written contracts were for the sale of horse-beans, and rectification was not possible where the oral and written contracts were in the same terms. Denning and Morris L.JJ. intimated the opinion that the contract was not void for mistake, for it was merely, in the words of Morris L.J., " a mistaken impression as to what their agreement would achieve." Denning L.J. expressed it by saying that there was only " an erroneous assumption underlying the contract." His judgment contains some interesting remarks on the possibility of equitable rescission or an action for breach of warranty.

Denning L.J. went into the theoretical question more fully. He said : " Even a common mistake as to the subject-matter does not make it a nullity. Once the contract is outwardly complete, the contract is good unless and until it is set aside for failure of some condition on which the existence of the contract depends, or for fraud, or on some equitable ground." In the formation of contract one does not " look into the inner minds of the parties—into their intentions." The learned judge referred to *McRae* v. *Commonwealth Disposals Commission* (1951) 84 C.L.R. 377, where he said the High Court " showed convincingly that *Couturier* v. *Hastie* (1856) 5 H.L.C. 673 was a case of construction only. It was not a case where contract was void for mistake."

It is submitted with the greatest respect that these remarks are capable of misinterpretation. Let it be supposed that with the contract as it was in the instant case, both parties had gone into

the witness box and testified that they realised the distinction between ordinary horsebeans and "feveroles," but that they used the term "horsebeans" to mean "feveroles" and not to mean ordinary horsebeans. In that event, it is clear, the contract would be valid for the sale of feveroles and there would be no contract for the sale of ordinary horsebeans. A contract is not enforced according to its "outward appearance" if both parties concur in intending something else. It is not invariably true, therefore, to say, as Denning L.J. does, that in the formation of a contract "one does not look into the inner minds of the parties."

In *McRae* v. *Commonwealth Disposals Commission*, Dixon and Fullagar JJ. analysed *Couturier* v. *Hastie* and thought that it did not decide that the contract was void for initial impossibility, but only that the seller could not get the price. These judges left open the question whether a contract is void for initial impossibility of performance. The language of Denning L.J. in the instant case seems to suggest that had it not been for the particular wording of the contract in *Couturier* v. *Hastie* the result would have been different. But this is hard to believe, for if the subsequent destruction of specific goods frustrates an agreement for the sale of those goods, as it does under *Taylor* v. *Caldwell*, 3 B. & S. 826, and section 7 of the Sale of Goods Act, it is common sense that prior destruction must have a similar vitiating effect. Moreover the common understanding of the rule in *Couturier* v. *Hastie* is affirmed by section 6 of the Sale of Goods Act.

Glanville Williams.

Exemption Clauses—Contractual and Tortious Liability

During recent years the courts have set their faces against allowing parties to exclude their normal common law liabilities by exemption clauses in the contracts which they make. While maintaining the shadow of freedom of contract they have come close to destroying its substance in this field. This is a highly significant illustration of the way in which the law has adapted itself to the growing paternalism of the Welfare State. Before mentioning the latest illustration of this tendency it may be helpful to summarise, very briefly, the obstacles which a defendant may have to surmount if he is to persuade the court that he has effectively contracted-out of his normal responsibilities.

1. He may be met with a plea that contracting-out is barred by some special legislative provision. This is still relatively rare, but an important illustration will be found in the Hire Purchase Act, 1938, s. 8.

2. The court may rule that the exemption clause never was incorporated into the contract. Denning L.J. is particularly astute to exclude a clause on this ground—see, for example, *Harling* v.

Eddy [1951] 2 K.B. 739, C.A. But this, of course, is not normally open to the court if the clause is included in a written contract signed by the plaintiff. In that event the court may fall back on one of the following expedients.

3. They may refuse to enforce the clause on the ground that agreement to it was obtained by fraud or misrepresentation. This line of attack, which stems from certain *obiter dicta* in *L'Estrange* v. *Graucob* [1934] 2 K.B. 394, C.A., was recently applied in *Curtis* v. *Chemical Cleaning and Dyeing* [1951] 1 K.B. 805, C.A., to a case where the only misrepresentation was an entirely innocent misstatement about the ambit of the clause.

4. If that fails the court will strive to interpret the exclusion clause so strictly that it does not cover the circumstances in question. For example, an exclusion of "warranties" will not cover "conditions" (*Wallis* v. *Pratt* [1911] A.C. 394, H.L.; *Harling* v. *Eddy*, *supra*)—notwithstanding the patent absurdity of expecting the parties to have used words with the precision (and more than the understanding) of trained lawyers.

5. Even if the exemption clause is worded as widely as human ingenuity can suggest, the court may say that it cannot cover a complete failure to perform the contract ("a contract for the sale of peas cannot be performed by delivering beans"). The best known modern illustration is *Andrews* v. *Singer* [1934] 1 K.B. 17.

6. Alternatively they may say that the defendant, having committed a fundamental breach of the contract, is thrown back on his common law position and cannot rely on any exemptions in the contract: see *Alexander* v. *Railway Executive* [1951] 2 K.B. 882, where Devlin J. applied to a contract of deposit the law relating to the effect of deviation on a contract of affreightment.

7. Failing any of the above, they may decide that the written terms were modified by a later express warranty (see *Couchman* v. *Hill* [1947] K.B. 554, C.A.; *Harling* v. *Eddy*, *supra*), or that the written contract did not supersede an earlier express warranty (*Webster* v. *Higgin* [1948] 2 All E.R. 127, C.A.). This expedient is, of course, related to the even more sweeping doctrine that there may be a separate collateral warranty by one who is not a party to the main transaction at all: see *Brown* v. *Sheen & Richmond Car Sales* [1950] 1 All E.R. 1102; *Shanklin Pier, Ltd.* v. *Detel Products, Ltd.* [1951] 2 K.B. 854.

8. Finally, the courts may decide that notwithstanding the exclusion of contractual liability the defendant is liable in tort. A claim in tort probably arises most often against one who was not a party to the contract; for example, against the original manufacturer or supplier under the rule in *Donoghue* v. *Stevenson*. Against this liability the defendant cannot normally rely on an exemption clause in a contract to which, *ex hypothesi*, he was not a party (but see *Elder Dempster & Co.* v. *Paterson, Zochonis & Co.* [1924] A.C. 523, H.L.). But it seems that a claim in tort

may also be pleaded in an action between the two parties to the contract itself, and that once again the exemption clause will probably not apply. Whether it does so or not seems to depend (a) on the nature of the tort (for it seems to follow from the insurance cases that no one can contract out of liability for fraudulent or wilful torts), and (b) on the scope of the exemption clause. If the tort is negligence the defendant *can* contract out of liability but the court will if possible construe the exemption clause so that it does not cover negligence : *Rutter* v. *Palmer* [1922] 2 K.B. 87, C.A., *Alderslade* v. *Hendon Laundry, Ltd.* [1945] K.B. 189, C.A. In reality, therefore, this is merely an illustration of expedient (4)—a restrictive interpretation of the clause.

It was this last situation which arose in the recent case of *White* v. *John Warwick & Co.* [1953] 1 W.L.R. 1285, C.A. The plaintiff had hired a cycle from the defendants. A clause of the agreement provided, " Nothing in this agreement shall render the owners liable for any personal injuries to the riders of the machines. . . ." While the plaintiff was riding, the saddle tilted forward and he was thrown and injured. The Court of Appeal held that the clause did not protect the defendants against liability for negligence. It is not entirely clear whether, as the headnote and to a lesser extent the judgments suggest, this was because a claim could be pleaded in tort, and tortious liability was outside the ambit of the clause, or whether it was because the clause could be given subject-matter by construing it to apply only to breaches of warranties and conditions of fitness. The judgments, and particularly that of Denning L.J., seem to favour the former view. This brings us up against the disputed question whether, when a contractual relationship exists and imposes a duty of care, the claim can be validly framed in tort instead. The test seems to be this : If the relationship between the parties is purely contractual (*e.g.*, that of solicitor and client), negligence can only be pleaded as a claim in contract : see, for example, *Groom* v. *Crocker* [1939] 1 K.B. 194, C.A. If, however, as in the instant case, the relationship could exist quite apart from contract (*e.g.*, that of bailor and bailee or invitor and invitee) the claim may be framed in tort instead. On the whole, however, it seems more reasonable to base liability on the argument that the exemption clause did not cover negligence whether the duty of care arose *ex contractu* or otherwise. It is surely fanciful to ascribe to the parties an intention to contract out of negligence pleaded one way but not the other?

L. C. B. G.

Breach of Statutory Duty

Mulready v. *J. H. & W. Bell, Ltd.* [1953] 2 Q.B. 117, is an important case on breach of statutory duty under the Factories

Act, 1937, and the regulations made under it. The defendants, Bell & Co., undertook with the owners of a factory in the course of erection to supply and fix metal sheeting and to instal three ventilators on its roof. By a loose oral arrangement, Bell & Co. agreed with K. that the company should supply the materials, plant and tackle, and that K. should supply small hand tools and carry out the work of fixing the sheeting and ventilators in position. The plaintiff was employed by K. on this work when he fell 70 feet from the roof to the ground, suffering severe injuries. None of the precautions for the safety of persons working on roofs prescribed by Regulation 31 of the Building (Safety, Health and Welfare) Regulations, 1948, had been taken, either by K. or by the defendants.

The plaintiff claimed damages from Bell & Co. both for negligence at common law and for breach of statutory duty under the Building Regulations. The action came before Pearson J. (reported [1952] 2 All E.R. 63) who held that the common law claim failed on the ground that the plaintiff was at the time the servant of K. not of the defendants. Whether or not the defendants were liable for breach of statutory duty depended on the construction of Regulation 4 of the Building Regulations, which specifies the persons by whom the various statutory duties are to be observed; Regulation 31 itself being impersonal in form, not specifying by whom the precautions are to be taken. Regulation 4 provides that—

"It shall be the duty of every contractor and employer of workmen who is undertaking any of the operations to which these regulations apply . . . (ii) to comply with such of the requirements of regulations 31–33 . . . as relate to any work, act or operation performed or about to be performed by such contractor or employer of workmen."

It was argued for the defendants that, having subcontracted with K. for the work on which the plaintiff was employed at the time of the accident, they could not be said to be "undertaking" or "performing" operations within the Regulation, and so were under no statutory duty to take precautions for the plaintiff's safety. Pearson J. rejected this contention, on the ground that, the subcontract being of "a very partial and minor character" and one under which the defendants retained control of the work and the manner in which it was to be done, the defendants were still "undertaking" an operation and "performing" work within the meaning of the Regulation.

Pearson J.'s judgment has now been affirmed by the Court of Appeal, though not on the narrow grounds that the trial judge chose. Whereas the latter's reasoning is quite unexceptionable, the reasoning of the Court of Appeal is startling. The defendants, it was held, having agreed with the factory owners to do the work, could not avoid the statutory duty to take precautions for the

safety of men working on the roof by subcontracting with another. This followed, the court held, from the ordinary principle stated by Lord Blackburn in *Dalton* v. *Angus* that "a person causing something to be done, the doing of which casts on him a duty, cannot escape from the responsibility attaching on him of seeing that duty performed by delegating it to a contractor." "We cannot doubt," said Lord Goddard C.J., delivering the considered judgment of the court, "that [the defendants] had undertaken to perform the work, and had it not been done, or done in an unsatisfactory manner, it would have been against Bell & Co. only, and not against their subcontractors, that the building owner would have had a remedy."

The relevance of this reasoning to the issue before the court is not easy to follow. The question at issue was whether the defendants were persons on whom Regulation 4 imposed a duty to take the precautions required by Regulation 31. This turned, as Pearson J. saw, on whether the defendants could be said to be "undertaking" an operation to which the Regulations applied, in which event they would come under a duty to comply with such of the requirements of, *inter alia*, Regulation 31 as related "to any work, act or operation performed or about to be performed" by them. The defendants were not contending that they had or could divest themselves of a statutory duty by subcontracting with K.; their argument was that the words of Regulation 4 imposed the duty only on persons who were actually carrying out building operations, and that, having subcontracted with K. for the work, they were not themselves carrying out the operations and so were under no duty. The statutory duty is imposed on contractors who undertake operations, not on contractors who undertake *to perform* operations. It is difficult to see how the fact that Bell & Co. had undertaken to perform the work, with the result that, had the work been unsatisfactory, the building owner's remedy would have been solely against them, could be relevant to the inquiry before the court. On the constructions of the words "undertaking" and "performing," it is surprising that no reference was made to the terms of section 107 of the Factories Act, 1937, by which, and by which alone, the power of the Minister to make special regulations for the safety of workmen in special trades is extended to building operations. That section provides that certain provisions of the Act, including the power, under section 60, to make special regulations for the safety of workmen, "shall apply to building operations undertaken by way of trade or business." The provisions specified "shall have effect as if any place where such operations are carried on were a factory, and any person undertaking any such operations . . . were the occupier of a factory." The section also provides that copies or abstracts of the Act and any regulations made under the section are to be "kept

posted up at each office, yard, or shop of the person undertaking the operations. . . ."

The provisions of this section leave little doubt that by "undertaking operations" is meant actually carrying out operations, and not merely undertaking with another to perform them. The Building Regulations, 1948, should be construed together with the parent section of the Factories Act from which they derive their force. The failure of the court to refer to this section must detract from the authority of the decision.

Douglas Payne.

Waiver of Tort

It is odd that in *Rosenfeld* v. *Newman* [1953] 1 W.L.R. 1135, C.A., no reference was made to *United Australia, Ltd.* v. *Barclays Bank, Ltd.* [1941] A.C. 1, for the question of legal principle involved in the two cases was precisely the same. It will be recalled that in the latter case the House of Lords held that there was no effective waiver of tort by suing in quasi-contract until judgment had been obtained on the claim in quasi-contract. In *Rosenfeld* v. *Newman* the question was whether a claim against the defendants as trespassers was waived by abortive proceedings against them under the Rent Acts, and again a negative answer was given by the court. The principle of the *United Australia* case is evidently one of general application in the field of waiver of tort.

Glanville Williams.

Invitees—Notice of Unusual Dangers

Since the famous judgment of Willes J. in *Indermaur* v. *Dames* a question which has agitated common lawyers is whether an occupier performs his duty to take reasonable care to prevent injury to an invitee merely by giving him notice of an unusual danger. In England at least the question is now answered authoritatively by the decision of the majority of the House of Lords in *London Graving Dock Co., Ltd.* v. *Horton* [1951] A.C. 737, which rests upon the proposition that a full appreciation of the danger on the part of the invitee and a continuance of his work with that knowledge are sufficient to free the occupier from liability. It is significant that five of the judges who considered that particular case, two members of the House of Lords and three members of the Court of Appeal, and Lord Wright (see 67 L.Q.R. pp. 532–4), in effect rejected that proposition. To that list may now be added one member of the Irish Supreme Court.

In *Long* v. *Saorstat & Continental Steamship Co., Ltd.* (1951–53, unreported as yet), a stevedore claimed damages for injuries received while working as an invitee on the defendant's ship. At the

trial the question whether the invitee had knowledge of the danger was in issue, and on appeal the question of the effect of such knowledge on the occupier's liability and the merits of *Horton's* case were argued. In the result the Supreme Court ordered a new trial on other grounds, and only Kingsmill Moore J., *obiter*, examined the problem in *Horton's* case. He referred to the well-known dictum of Willes J. in *Indermaur* v. *Dames* which prescribes the duty of an invitee and in particular to the parenthetical phrase, " the question whether such reasonable care has been taken, *by notice*, lighting, guarding or otherwise . . . must be determined by the jury . . . ," and stressed the ambiguity of this phrase. One interpretation, that adopted by the majority of the House of Lords in *Horton's* case, is that the occupier has taken reasonable care if he has given notice of the danger to the invitee. Kingsmill Moore J. said of this interpretation that it " leads to a result which seems to me repugnant to common sense and inconsistent with that reasonable regard for the safety of others which permeates the common law." He preferred the alternative interpretation favoured by the English Court of Appeal and the dissenting judges in the House of Lords in *Horton's* case, namely that the occupier can discharge his duty to the invitee only by employing precautions varying with the particular danger : knowledge of the danger conveyed to the invitee might suffice to excuse the occupier in some circumstances but it might not be sufficient in others. Kingsmill Moore J. proceeded to formulate what it is believed is a novel test : *the crucial question should be whether the invitee can, by virtue of such knowledge, efficiently carry out the task for which he has come without exposing himself to such danger.* If so, the occupier by giving notice has performed his duty, and the invitee who does suffer injury is disabled from recovering compensation by failing to use reasonable care on his own part for his own safety. If not, the occupier has failed in his duty to use reasonable care towards the invitee, and is liable to compensate the invitee who is eventually injured.

One class of invitees is that of workmen employed by a firm which alone is in a contractual relation with the occupier of premises. These workmen come upon the premises for the benefit of the occupier although they are not in his employment. In the realm of fact if such a workman is given notice by the occupier of an unusual danger on the premises he is placed in a dilemma. Either he may refuse to carry on with the work which involves danger, and thus risk his job or at least incur the mockery of his employer or his fellow workmen; or he may go ahead with the dangerous work and risk his life or limbs. The rule of law laid down by the House of Lords in *Horton's* case only sharpens his dilemma. He may refuse to do the work and risk dismissal, or do the work and risk injury without compensation from the occupier. The rule affords a wide immunity to occupiers—more,

probably, than many would in fact claim—and defeats the interests of diligent workmen. But the rule suggested by the Irish judge in *Long's* case offers the workman a reasonable way out of his dilemma. If he chooses to go ahead with the work after being informed of the danger, and he cannot then as a prudent man circumvent it while carrying out his task efficiently, he is entitled to compensation from the occupier if he is injured. Only if he could have avoided the danger as a prudent man while doing his work is he to be denied compensation. This rule meets the reasonable claims of diligent and careful workmen while it disallows the unreasonable claims of careless workmen. But does it satisfy the interests of workmen at the expense of occupiers' interests? It must be emphasised that in this type of case such workmen have come upon the premises for the benefit of the occupiers. The occupier who gives notice of a danger which the workman could then reasonably avoid is freed from liability. It is only the occupier who merely gives warning of a danger, when in fact warning alone is not sufficient to prevent injury to a circumspect but diligent workman, who is liable to compensate the injured workman. In England and Ireland today most business men and landowners would probably admit responsibility towards injured invitees in such circumstances. At least the remedy is in their own hands—to take more active steps to prevent injury.

While these dicta of an Irish judge may only be of academic interest to English lawyers, in view of *Horton's* case, they might conceivably tip the balance of judicial opinion in other common law jurisdictions which are not absolutely bound to apply the principles of the decisions of the House of Lords. Moreover, even in England, this branch of the law is now being reviewed by the Law Reform Committee.

F. E. Dowrick.

A Kiss for Cinderella

The decision of the Court of Appeal in *Re Old Silkstone Collieries, Ltd.*,[1] would be noteworthy if only because it represents a belated victory for preference shareholders—the Cinderellas of the stock market—who in recent years have been beset by misfortunes. In 1949 the ugly sisters—*Scottish Insurance Corpn.* v. *Wilsons & Clyde Coal Co.*[2] and *Prudential Assurance* v. *Chatterley-Whitfield Collieries*[3]—deprived them of a presumptive right to share in surplus capital which they had enjoyed since 1933 under a decision of the Court of Appeal,[4] and then added insult to injury by ruling that

[1] [1954] 2 W.L.R. 77. C.A.
[2] [1949] A.C. 462, H.L.
[3] [1949] A.C. 512, H.L.
[4] *Re Wm. Metcalfe Ltd.* [1933] Ch. 142, C.A.

they could be repaid at par under a reduction of capital. As Evershed M.R. said in a later case,[5] " the view of the courts may have undergone some change in regard to the relative rights of preference and ordinary shareholders—and to the disadvantage of the preference shareholders whose position has . . . become somewhat more approximated to the role . . . of debenture-holders." But if they share the disadvantages of debenture-holders they have none of their advantages; they lack both security and, it seems, freedom from risk of being repaid when interest rates fall, even though expressed to be irredeemable.[6]

Last year they suffered a further blow—though a less unexpected one[7]—when the Court of Appeal ruled[8] that they had no right to object to an increase of ordinary capital by a bonus issue which tilted the balance of voting power in favour of the ordinary shareholders. Notwithstanding that the " modification of rights " clause in the articles covered any change which " affected " class rights, the protection of this clause could not be invoked by the preference shareholders. Though the value of their rights was " affected in the business sense " the rights themselves remained unaffected; they still conferred one vote per share, and in the eyes of the law it made no difference that the power of this vote had diminished.

But now at last Cinderella has triumphed. At the instance of preference shareholders the courts have refused to confirm a reduction of capital. This is unusual enough. But further, one of the grounds on which they have done so is that of general unfairness. This is unique in this century.[9] Only the intervention of the fairy godmother can account for this startling break with Chancery traditions.[10] As Lord Cooper said in his masterly dissenting judgment in the Inner House of the Court of Session in the *Wilsons & Clyde* case,[11] " Examples abound of the refusal of the courts to entertain the plea that a scheme was not fair or equitable, but it is very hard indeed to find in recent times any clear and

[5] *Re Isle of Thanet Electric Co.* [1950] Ch. 161, C.A. at p. 175.

[6] If all preference shares can be redeemed on a reduction of capital it is difficult to see what purpose was fulfilled by the introduction in 1929 of Redeemable Pref. Shares with elaborate provisions about Capital Redemption Reserve Funds, etc., see Companies Act, 1948, s. 58.

[7] In view of *Greenhalgh* v. *Arderne Cinemas* [1946] 1 All E.R. 512, C.A.

[8] *White* v. *Bristol Aeroplane Co.* [1953] Ch. 65, C.A., *Re Smith's Tadcaster Brewery* [1953] Ch. 308, C.A.

[9] I believe this is right. Certainly there is no reported English case since *Re Barrow Haematite Steel Co.* [1900] 2 Ch. 840; [1901] 2 Ch. 746, C.A., and there the C.A. expressed no opinion on the point of unfairness which had been adopted as an alternative ground by the trial judge. A fairly diligent search has failed to find any unreported decision either.

[10] Eye-witnesses' accounts of this stirring occasion suggest that the fairy godmother operated in the guise of the common lawyer on the bench (Morris L.J.), who appears to have been less oppressed by the weight of these traditions and to have had considerable influence in transmuting the *ferae naturae* of his Chancery colleagues.

[11] 1948 S.C. at pp. 375 *et seq.*

instructive instance of the acceptance of such an objection. . . . The circumstances of the present case impress me as so exceptional that, if the power to refuse confirmation is not to be exercised here,[12] I have difficulty in figuring circumstances in which it will ever be worth invoking it again." Well, in *Re Old Silkstone Collieries* it was invoked and did prove worthwhile. But, unfortunately for those who hope that the decision heralds a change in practice, an examination of the facts show that these were in some respects even more exceptional than those of the *Wilsons & Clyde* case.

Both cases arose out of the coal nationalisation. Section 25 of the Act,[13] and the regulations made under it, provide for adjustment of the rights to the compensation received on nationalisation as between various classes of shareholders in the company. In the *Wilsons & Clyde* and the *Chatterley-Whitfield* [14] cases the House of Lords held that notwithstanding these provisions the court was bound to confirm a reduction of capital under which the company used the compensation to pay off the preference shares in accordance with their rights on a winding up [15]—in these cases at par. It is greatly to the credit of most of the colliery companies that they did not treat their preference shareholders so scurvily. Thus the *Old Silkstone Collieries*, instead of paying off their preference capital at par, made successive reductions of the first and second preference stock but expressly provided in the resolutions that the holders should retain their rights under section 25 as if there had been no reduction. Since this involved payments to the second preference shareholders before the first preference had been fully repaid, it clearly involved a variation of rights, and the resolutions were duly confirmed by class meetings, under the "modification of rights" clause in the articles, and by the court. Eventually, however, the management apparently decided that rights under section 25 were valueless and they therefore propounded a further scheme whereby the preference capital was to be completely repaid at par. This was not submitted to class meetings but was duly passed as a special resolution at a general meeting at which only the second preference and ordinary shareholders were entitled to vote.[16]

When the reduction came before Vaisey J. for confirmation he attempted to protect the preference shareholders by inserting a proviso that their rights under section 25 should remain notwithstanding the destruction of their stock. On appeal it was agreed

[12] It was not: [1949] A.C. 462, H.L. *supra*.
[13] Coal Industry Nationalisation Act, 1946.
[14] [1949] A.C. 512, *supra*.
[15] Unless, of course, the terms of issue accord special rights on a repayment under a reduction scheme. Since these cases it has been common to tie the price of repayment to the current quoted price.
[16] In other words they finally decided to follow the practice adopted in the *Wilsons & Clyde* and *Chatterley-Whitfield* cases.

by all parties that this proviso could not be effective since the total elimination of the stock necessarily destroyed all rights attached to it. In these circumstances the Court of Appeal rejected the scheme, primarily on the ground that the express reservation of full rights under section 25 had become a special class right so that it could not be abrogated without class consents. This was sufficient to distinguish the earlier cases, and rejection on this ground—though rare—is in accordance with well-established practice. The only respect in which the court may here have gone further than the earlier cases, is in their apparent conviction that once it was determined that class rights were being infringed rejection automatically followed. Earlier decisions of the House of Lords suggest that a reduction may be confirmed even then, provided that it is positively established that the scheme is fair.[17] However, they may not have meant to deny this, for, as we shall see, it was here abundantly clear that fairness could not be positively established.

As already indicated, the unique feature of the case is that the court then went on to say that in any event they would have been prepared to reject the scheme as unfair. Unfortunately, it may well be that their observations on this matter were technically *obiter*.[18] And what is perhaps of more importance is that the propounders of the scheme were virtually self-convicted of unfairness. In their circulars supporting the earlier reductions they had made great point of the fact that the preference shareholders were being offered the opportunity to retain their full rights under section 25. Having secured consent to these schemes by offering this sop, they could not subsequently turn round and argue that the sop was valueless. Hence, although it was conceded that the onus of proving unfairness was on the objectors,[19] here the onus was easily discharged for unfairness was almost self-apparent. This will rarely be the case; normally the stage will have been set so as to give every appearance of fairness and the objectors will find the utmost difficulty in collecting the information necessary to refute it.

It is also noteworthy that the directors' final circular was susceptible of criticism, and there is, of course, plenty of

17 *British & American Trustee Corpn.* v. *Couper* [1894] A.C. 399, H.L.; *Carruth* v. *I. C. I.* [1937] A.C. 707, H.L., see especially *per* Lord Blanesburgh at pp. 744 and 749.

18 See *per* Evershed M.R. at p. 89. Having said that the only course open to the court was to dismiss the petition on the first ground, he went on "But we have heard full argument upon the other and more general matter, and . . . I think it right to express my view also upon the general question of fairness of the proposed scheme." This seems more consistent with "observations unnecessary for the decision" (*obiter*) rather than with "an alternative ground for the decision" (*ratio decidendi*).

19 This seems to be clearly established by the *Wilsons & Clyde* and *Chatterley-Whitfield* cases, though earlier authorities suggest the contrary: see, *e.g.*, *Re Barrow Haematite Steel Co.*, *supra*.

authority [20] for the proposition that a scheme will be rejected if there is anything misleading in the documents explaining it. Here the nature of the misleading statement was of some interest. It read: "These proposals have been submitted to and discussed with the Association of Investment Trusts and the British Insurance Association's Investment Protection Committee who are recommending their interested members to vote in favour . . . and to take no part in promoting or supporting any proposal for an adjustment scheme.[21] The use of an adjustment scheme would only involve long delay and expense." As the Master of the Rolls pointed out,[22] what the preference shareholders were plainly being told was, "It is really no good your pinning any hopes on your rights, if any, under section 25 of the Act of 1946. As you see, these very important bodies are of opinion that there is nothing to be got out of it, and they will give you no support at all." It was true that the proposals had been discussed with these bodies—indeed their representatives had settled the form of words used. But it gave an impression which was totally unjustified. Each Association only had three members holding stock in comparatively small quantities and sometimes balanced or swamped by the holdings of ordinary stock; and the Association of Investment Trusts never made any recommendation to their members (their records were not up to date), one of whom was in fact an objector. This shows that although the presence of the institutional investor with his professional association may often be a safeguard to the ordinary small investor, who can shelter under the big man's umbrella,[23] the umbrella may sometimes leak or be used as a cudgel to strike him down.

In view, therefore, of its quite exceptional facts, it would be going too far to suggest that the case is likely to result in any epoch-making change in the tendency to whittle away the protection of preference shareholders and to make illusory the safeguard of court sanction. Cases in which unfairness appears "on the record" are likely to be rare indeed; and in other cases the court, unless supported by some administrative agency, is ill equipped to make the needful financial investigations. Even in the *Silkstone* case itself, it remains to be seen whether, in the end, the preference shares will benefit. Cinderella had her hour of triumph, but when midnight struck all she had left, apart from her memories, were her rights under section 25. Time alone will tell whether these will prove to be the veritable glass slipper or a broken reed.

L. C. B. G.

[20] Though most of the decisions concern schemes under other sections, see, *e.g.*, *Re Dorman Long & Co.* [1934] Ch. 635.

[21] *i.e.*, under s. 25.

[22] At p. 94.

[23] *Cf.* the *Chatterley-Whitfield* case in which the Prudential carried the case to the H.L. (vainly it is true) in the interests of the preference shareholders.

Haute Ecole and the Unruly Horse

The man in the street may not be happy about two recent decisions of the Court of Appeal—*Re Delhi Electric Supply and Traction Co., Ltd.* [1953] 3 W.L.R. 1085, and *In the Estate of Maldonado* [1954] 2 W.L.R. 64, C.A.—particularly when considered in juxtaposition. But lawyers who have writhed uncomfortably beneath the sneer that English law is not based on logic but on mere convenience will take comfort; we are changing all that. Both decisions are beautifully logical, neither owes anything to convenience, and jointly they show the unruly horse, public policy, performing strange tricks with the utmost elegance.

In the first case it was held that the Indian Government could not prove in the English liquidation of a solvent company for income tax due to it. English law will not enforce a foreign revenue claim; in English private international law, India is foreign; therefore the claim could not be proved. Had the claim been by the Communist Party for covenanted contributions due to it, these would have been provable (assuming they were *intra vires* the company) but a Commonwealth revenue claim was barred.

In the second case it was held that the Spanish Government could claim English movables to which it was entitled under the Spanish Code on the death of someone domiciled in Spain. Under English private international law successors of movable property are determined by the *lex domicilii* (Spanish law); under Spanish law the Spanish Government were the successors; therefore the claim of the Spanish Government had to be upheld. It would have been different if, under the Spanish Code, the Government had claimed *jure regale*, for then the English movables would have passed to the English Crown as *bona vacantia*: *Re Barnett's Trust* [1902] 1 Ch. 847; *Re Musurus* [1936] 2 All E.R. 1666. To the uninstructed the practical effect might seem to be the same, but the distinction is approved by all the jurists. It is merely a misfortune that legal systems based on the English express their Government's claims *jure regale* so that they will not be able to benefit from this ruling.

It is to be hoped that the Indian Government will properly appreciate the logical symmetry of the system which we have bequeathed to them, and will not take the superficial view that, when their fate is compared with that of the Franco Government on this occasion, the advantages of remaining a democracy within the British Commonwealth were not obvious.

L. C. B. G.

Conflict of Laws—Immovable and Movable Property

Cases of the following type have not infrequently occurred in recent times; they involve an interesting problem of Private International Law, which has been considered by the Estate Duty Office.

A person who came to this country as a victim of Nazi persecution in Germany and who is now domiciled here, leaves upon his death a claim for the restitution of title to land situated in Germany. Prior to his decease restitution proceedings had been commenced in Germany under Allied Military Government legislation, which now forms part of the German legal system. The question is whether or not such claim should be deemed " immovable property " for the purposes of English Estate Duty law.

It may be recalled that:

(a) immovable property situated abroad is not subject to English Estate Duty;

(b) that in this respect the concept of Immovable Property is the same as in Private International law—to be distinguished, of course, from that of realty;

(c) that the question of whether property is movable or immovable is governed by the law of the situs (*Re Hoyles* [1911] 1 Ch. 179, 186; *Re Berchtold* [1923] 1 Ch. 192, 199.

Furthermore, there cannot be any doubt that the property in question is situated in Germany, whether it may be classified as movable or immovable.

In the first instance, therefore, the classification of the property has to be made under German law. Does such reference to German law, however, include a reference to German Private International law, and if so, what is the final result?

There is no need to quote the considerable number of authorities which, strongly opposed on the part of learned writers, have now established the " Foreign Court Theory," according to which the English court will apply the same law as that which would have been applied by the appropriate foreign court to whose law English Private International law refers the matter in the first instance. It may be noted, however, that the last of these famous cases, the case *Re Duke of Wellington* [1947] Ch. 506 refers to the title to land situated abroad; Cheshire, a famous opponent of the Foreign Court Theory, " exceptionally " approves of it in cases where the title of foreign property is involved, and explains that and why in such a case reference to the law of the situs covers the whole body of that law, including its Private International Law (4th ed., p. 545).

It cannot be said that *Re Duke of Wellington* is a direct authority regarding our problem. There is a marked difference between determining the title to foreign immovable property on the one hand and classifying its character as immovable property on the other. But it is submitted that both these questions should be answered in the same way, *i.e.*, in accordance with the same fundamental principle of law, *viz.*, the Foreign Court Theory. It may be allowed to quote in support the following passage from Falconbridge's essay on " Renvoi and Characterization ": (p. 186 of his Essays)

> "My object is limited for the moment to pointing out that, so far as there is any logic in the present subject, the application of the doctrine of the renvoi might be just as logical or illogical in this class of conflict rules as in any other class. Conflicts of this class may be less obvious or more subtle than the conflicts in which the doctrine has heretofore played a part, but as the courts become more conscious of the existence of latent conflicts arising from divergent modes of Characterization, then, if they are disposed to decide a case as it would be decided by a court of a given foreign country [Falconbridge himself is not in favour of their doing so] there is no particular reason why they should not extend the doctrine of the renvoi to these conflicts."

From this point of view German Private International Law is relevant to cases of the type referred to above. There is German authority directly in point: a case decided by the Supreme Court (*Reichsgericht*, Vol. 145, pp. 85, 87) which deals with the problem as follows:

> "if, therefore, the foreign law in question refers to German law only in cases concerning immovable property, then the decision what property has to be considered immovable, can only be gathered from that foreign law. The view of the appellant that in case the foreign law refers the matter to German law also the construction of the legal concepts used in the foreign legal provision containing such reference has to be governed by German law would moreover be impracticable in cases where such legal concepts are not known to German law."

German Private International Law, then, refers the matter back to English law.

These considerations were submitted to the Examiner of the Estate Duty Office in a case in point. His reply was that he did not propose "to question further your submission that no claim for estate duty arises in connection with the transaction detailed therein." The decision reached appears to be based on the assumption that the claim of the deceased, a claim for the transfer of land, is to be considered an immovable asset from the point of view of English law.[1]

As may be mentioned in passing, there are good reasons to assume that in the case under discussion the same result would be reached if the concept of "immovable property" were determined on the basis of German law. Furthermore, it is worth noting that

[1] Green, in his *Commentaries on Death Duties*, 3rd ed., p. 420, states: "It is not the practice to claim duty in respect of immovable property abroad, by reason only that the *lex situs* applies the doctrine of *renvoi* and thereby invokes English or Scottish law (whether by reference to the nationality or to the domicile of the deceased)." It is not quite clear what kind of case Green has in mind. The fact that the *lex situs* applies the doctrine of *renvoi* obviously cannot *by itself* make an asset subject to duty which otherwise would be free from duty as a foreign immovable. Does Green think of a case where the asset would be classified as a movable in English law?

it is irrelevant if—as frequently happens—subsequent to the claimant's death a settlement is reached to the effect that the successors in title receive a money payment in lieu of the restoration of title to the land. This is what happened in the case considered by the Estate Duty Office, and the fact was made known to the office.

The result is to be commended, not because it is gratifying to the beneficiaries concerned, but because it offers a way out of the deplorable situation that is bound to arise where a foreign law has to be applied which itself does not claim to be applicable to the matter.

W. Breslauer.

Arbitrations—Award of Costs

The Evershed Report debates, and leaves in doubt, the question whether the English practice of awarding costs to the successful party is in fact sound. There can be no doubt that arbitrators have habitually exercised a much freer discretion and that in many types of commercial arbitration each side is left to pay its own costs more often than a full award of costs is made to the winner. This practice does not seem to have aroused objection; indeed it is reasonable to suppose that those who resort to arbitration prefer it thus. If so, they are likely to be disappointed. Two recent decisions—*Smeaton Hanscomb & Co.* v. *Sassoon I. Setty, Son & Co.* [1953] 1 W.L.R. 1481, and *Lewis* v. *Haverfordwest R. D. C.*, *ibid.* 1486—make it clear that in the absence of special circumstances the successful party to an arbitration is entitled to his costs, that the arbitrator's discretion in the matter must be exercised judicially, and that if his award is stated in the form of a special case he should state his grounds whenever he has departed from the usual order.

Whether consciously or not, the courts seem to be trying to counter the drift away from the courts towards arbitrations by subjecting arbitrations to the rigours of litigation. Some would wish that they would try the alternative course of introducing greater flexibility into litigation.

Admissibility of Written Evidence

Bowskill v. *Dawson* [1953] 3 W.L.R. 969, is another case which lends point to observations in the Evershed Report. This Report criticised the limited scope, restrictive interpretation and inadequate use of the provisions of the Evidence Act, 1938, intended to lead to the freer use of documentary evidence in civil proceedings. Section 1 (1) provides that " where direct oral evidence of a fact would be admissible, any statement made . . . in a document and

tending to establish that fact shall, *on production of the original document*,* be admissible. . . ." Subsection (2) provides that if the court is satisfied that undue delay or expense would otherwise be caused it may order that in lieu of the original document a certified copy may be admitted instead.

In *Bowskill* v. *Dawson*, the plaintiff, shortly after a road accident, signed a written statement of which the police made a typed copy. Before the trial the plaintiff had died and his original statement had been lost. Devlin J. held that the copy was inadmissible. Subsection (1) did not apply because that only covered original documents. Nor could the copy be introduced under subsection (2) because that only applied when the original document was in existence, but its production would cause unnecessary delay and expense. In the words of the learned judge : " I am bound to say that I think that this is not an altogether satisfactory ground, from the common-sense point of view for excluding documents. I have no reason to doubt that the copy in this case is an accurate copy and of just as much value as the original would have been." In fact, as he also ruled, the particular statement in that case would also have been inadmissible under subsection (3) as one made by an interested party. This fortuitous circumstance scarcely mitigates the absurdity of the ruling which the learned judge was constrained to give on the main question.

L. C. B. G.

Recent Decisions on the Financial Relations between Husband and Wife

Several recent decisions have illuminated the law on the property relations between husband and wife, apart from their respective rights in the matrimonial home. *King* v. *King* [1] exemplifies the hard case that makes good law. Adultery by the husband was admitted, but he had evidence of cruelty by the wife strong enough to gain him a decree *nisi* at first instance, which, however, was reversed on appeal to the Court of Appeal and the House of Lords.[2] The wife then petitioned not for divorce, but for judicial separation, making at the time no application for permanent alimony under the Matrimonial Causes Act, 1950, s. 20 (2). This decree obtained, she then claimed secured periodical payments under section 23 (2) instead of unsecured alimony under section 20 (2), and the Court of Appeal, affirming the decision of Davies J., held that she was entitled to do this. The words of section 23 (2), giving the court jurisdiction to order secured periodical payments " if it would have jurisdiction to entertain proceedings by the wife for judicial separation," were held to cover the case where the judicial

* My italics.
[1] [1953] 3 W.L.R. 767; 2 All E.R. 1029, C.A.
[2] [1953] A.C. 124, and see 16 M.L.R. 68.

separation has already been granted, since the words mean only that the parties must have the requisite domiciliary or residential qualifications. A wife deserted for less than three years may, so the court said, also apply for such secured payments.

Not only does the decision afford the happy spectacle of Morris and Singleton L.JJ. finding themselves in complete agreement with the judgment of Denning L.J., but this judgment contains also a lucid historical account of the growth of financial remedies available to wives, both in the High Court and the courts of summary jurisdiction, which should prove increasingly valuable as the origins of these remedies become more thickly wrapped in the veil of history. The decision may also tend to halt a recently increasing tendency to confuse the jurisdiction of the court with the possession of a well-founded cause of action by the litigant.

Style v. *Style and Keiller*[3] involved an application under the Matrimonial Causes Act, 1950, s. 24, for the settlement of the property of a wife divorced for adultery. In varying the order suggested by the registrar, Barnard J. applied the principle of *Lorriman* v. *Lorriman and Clair*[4] that the court must try to ascertain the nature and extent of the pecuniary change caused by the wife's criminality, coupled with the principle laid down in *Matheson* v. *Matheson*[5] that the settlement is not intended to be used as a punishment of the wife, or, indirectly through the wife, of a co-respondent. He found that since the wife had, even before the liaison with the co-respondent, not allowed the husband to enjoy her fortune to the same extent as one would expect in a more normal case, the amount she would be compelled to settle on him would be correspondingly reduced. Such a result would surely surprise Lord Penzance, who declared in *March* v. *March and Palumbo*,[6] "It would be of evil example if this court were to decide that the entire fortune of a wealthy woman was reckoned as part of the prospects of an adulterer, or the resources of a second home for a guilty woman." In *Matheson* v. *Matheson*[5] the wife's property was worth only a small proportion of the husband's, and her contribution to the maintenance of the family establishment was of necessity insubstantial. But in *Style* v. *Style* the wife's property was worth many times that of her first husband, and it was apparently her meanness in her relations with him that caused the reduction in the settlement of her property following her adultery.

The amount of the order was left unchanged on appeal, but before the Court of Appeal of Singleton, Jenkins and Hodson, L.JJ.,[7] the parties agreed, as they had failed to do at first instance,

[3] [1953] 3 W.L.R. 613; 2 All E.R. 836.
[4] [1908] P. 282.
[5] [1935] P. 171.
[6] (1867) L.R.P. & M. 440, 443.
[7] [1954] 2 W.L.R. 306.

that the drafting of the settlement should be referred to conveyancing counsel. The Court of Appeal, reversing Barnard J., also held that section 24 of the Act also gives the court power to make provision retrospectively for any period between the date when application for settlement is made and the date when it is finally effected. This at least remains some incentive to delay the conclusion of the settlement, where a wife adds meanness to her other matrimonial offences.

A welcome decision in the Chancery Division by Roxburgh J. in *Re T.* (*Infants*) [8] was that a magistrate had rightly taken the mother's income into account in assessing the maintenance for a child payable by the father under the Guardianship of Infants Acts, 1886–1925.

The courts have recently shown increasing awareness [9] of the fact that the personal and financial independence of the married woman involves also her personal and financial responsibility, particularly in respect of her children.

An historical review of the maintenance orders available to a wife in the courts of summary jurisdiction, particularly with respect to the children of the marriage, was given by the President in the Divisional Court of the Probate, Divorce and Admiralty Division in *Kinnane* v. *Kinnane* [10] when he pointed out that any order available since 1920 for maintenance of infant children on desertion is an order in favour of the wife and not of the children. This is the tax position in respect of maintenance orders in the High Court, according to *Stevens* v. *Tirard*.[11] Short of the criminal sanctions for neglect, which will be invoked only in the most extreme cases, there would seem to be no machinery for ensuring that deserted wives apply to the maintenance of the children a proper proportion of the payments their husbands are ordered to make to them. The magistrates' order, that the husband shall pay £X for the wife and £Y for the child means only that £X + Y must be paid to the wife, who is the sole judge of how or on whom it should be expended. Any failure by the husband to maintain wife or child enables the wife to summon him for wilful neglect to provide reasonable maintenance for her. Wife and children are in fact, considered inseparable. This may be inevitable for infants in arms, but is it so for children of fourteen or fifteen years of age? The very proper reluctance of public authorities to intervene between mother and child makes abuse more probable.

O. M. Stone.

[8] [1953] Ch. 787.
[9] See, *e.g.*, Denning L.J. in *Biberfeld* v. *Behrens* [1952] 2 Q.B. 770, 783, and the decision in *Plunkett* v. *Alker* [1954] 2 W.L.R. 280.
[10] [1953] 3 W.L.R. 782; 2 All E.R. 1144. The decision was applied in *Starkie* v. *Starkie* (*No.* 2) [1954] 1 W.L.R. 98.
[11] [1940] 1 K.B. 204.

REVIEWS

Inquiries into the Nature of Law and Morals. By Axel Hägerström. Edited by Karl Olivecrona, Professor of Jurisprudence, University of Lund, Sweden. Translated by C. D. Broad, Knightbridge Professor of Moral Philosophy, Trinity College, Cambridge, England. [Stockholm: Almqvist & Wiksell. 1953. xxxii and 366 and (Bibliography and Index) 11 pp. Sw. cr. 25.00, bound Sw. cr. 30.00.]

Axel Hägerström (1868–1939) has exercised a dominating influence, whether by attraction or repulsion, on the contemporary generation of Scandinavian philosophers. His disciples have already done something to bring his ideas before the English-reading world, but this volume for the first time presents us with a selection of his own writings (of various dates from 1916 to 1939) on the philosophy of law and morals. They have been translated by Professor Broad and edited with a most valuable expository preface by Professor Olivecrona.

Hägerström taught in the University of Uppsala for forty years and his influence in his native country, so his editor tells us, depended more on his oral teaching than on his published work. Both translator and editor testify to the difficulty of his writing, due partly to the complexity of his thought but still more to the involved Germanic style in which he expressed it. Professor Broad merits both our commiseration and our congratulation. His translation, in Professor Olivecrona's judgment, actually reads more easily than the original. Yet it is still difficult and sometimes obscure. It is not always immediately clear whether some passages are to be read as *oratio obliqua* or *oratio recta* (whether, for instance, some of the sentences on p. 293 are to be read as stating the theory under discussion or Kelsen's criticism thereof or even Hägerström's criticism of Kelsen) nor is it easy to tell (for instance, on p. 351) which of the many sentences beginning with "But" merely attach a minor qualification to what has just been said, without diverting the main stream of argument, and which are meant to reverse the stream by introducing the antithesis to the preceding thesis. Moreover, there are in Hägerström's writing not a few traces (for instance, on p. 283) of what Professor Olivecrona tactfully calls "a certain polemical acerbity"; his representation of the views of others is sometimes strained almost to misrepresentation (*cf.* the passages of Kelsen referred to at p. 268, n. 2) and in controversy he could resort to quibbles and confusions in his desire to score at every point.

Examples of these faults will be found in the opening pages of this volume (especially pp. 2–3), pages which in other ways may reduce the lawyer to bewildered exasperation. Hägerström is here seeking to prove that what lawyers call the right of property is meaningless. "We must notice that the State does not step in as protector unless I have actually lost possession of the thing. . . . But the right of property would seem to be a right to the thing itself, *i.e.*, a right to retain possession valid against every other person. Can the State guarantee this? Of course not. All that it can do is to enable me to regain the house if it should already be in possession of another person." This overlooks the possibility of interdicts or injunctions against threatened eviction, to say nothing of remedies against trespass, nuisance and other forms of disturbance falling short of actual eviction. Perhaps Hägerström, who was writing with his eye on Roman law, would say that such remedies are based on possession rather than on *dominium* and that it is the abstract notion of

dominium distinct from possession that is meaningless; but if he had looked at the remedies for the protection of movable property he would have found that under the Lex Aquilia "the State stepped in as protector" of the *dominus* whether he was in possession or not, and the protection under the law of theft was based not on possession but on an interest *rem salvam esse* which more often resided in the *dominus* than in the possessor. To the lawyer the notion of *dominium* as distinct from possession does mean something, even if Hägerström could not explain what it means.

"Who"—he continues—"would make the right of property dependent on the question of proving the title? Yet in a lawsuit I can obtain legal protection only if I can bring forward proof." This typically scornful remark, incomprehensible to the lawyer—why should one not make the right of property dependent on proof of title?—perhaps gives a clue to all this confused page. Hägerström is asking what are the "real facts" of the situation in which lawyers find, or, as he would doubtless say, imagine, a right of property, and he has failed to understand that a title, such as a previous conveyance, is, just as much as a present possession, a fact on which legal remedies can be based.

It is not surprising that Hägerström concludes that "there are insuperable difficulties in determining the fact which corresponds to what we call a right of property." The difficulties are mainly of his own making and naturally he cherishes them.

But we must not be put off by such passages of quibbling thought and arrogant expression. It is clear that for all his tiresome faults Hägerström was a powerful and original thinker whose opinions must be seriously considered. There is much force in his attack on the imperative theory of law. Some of his arguments can doubtless be met. Thus, in order to attack the view that the right of property rests on a command by the State to all persons to respect, under threat of penalty for disobedience, the possession of the person entitled, he refers (p. 3) to the common case of a dispute in which both parties believe themselves to be in the right. "No one here has been disobedient. For disobedience implies that one was aware of the command. But suppose I believe that I am in the right, and therefore that the State has not commanded me to give up the thing to my opponent. Then I am in no way disobedient." (This, incidentally, is an argument which could have been more widely applied. The lawyer holds that *ignorantia juris neminem excusat* and he also knows of many cases where a man incurs legal liability for facts which he was unable to control or of which he was blamelessly ignorant; in all these cases it may well seem inapt to speak of disobedience to a command.) But the imperative theory of law can perhaps be saved if we look at the moment at which the normative rule calls for human action, and others of Hägerström's difficulties can be met by remembering that the practical application of rules is conditional upon the proof of the facts to which they relate. Thus we might say that in Hägerström's example the "command" really is: If it is proved that A has a better title to the possession of the thing than B, then B must surrender it to him, and on this point B must accept the judgment of a court against his own private belief. Hägerström is more successful in his demonstration that, if we insist on regarding law as a command or as based on will, we can seldom, if ever, identify any existent factual entity which commands or wills, and that those who resort to imagining some personified abstraction, like the State, as the commander do not succeed in explaining *why* the will or alleged will of this abstraction should have binding force. Yet we may suggest that fictions, even if bad masters, can be good servants, and the fiction or metaphor of a command is a useful and indeed almost indispensable aid to our attempts to analyse and explain the normative structure of legal thinking. If the fiction of the State as commander is deemed too dangerous (and it unquestionably is dangerous), the fiction of the law itself as commander, whose metaphorical character is more obvious, is surely harmless. Sir Frederick Pollock throughout an entire book

personified the common law of England as "Our Lady the Common Law," whom we obey and to whom we render service. Was there any harm in this?

Hägerström's attack on the *Willenstheorie* in its relation to private rights achieves similar partial success. His attempt to prove that our common references to the will of parties are quite meaningless does not carry full conviction, but he does at least show that the mere assertion that "the binding force of obligations depends on the will of the parties" does not explain *why* it should be made so to depend, unless we have recourse to some such "metajuristic" (by the way, could we not agree to abolish this horrible hybrid from our vocabulary and replace it by, say, "non-legal" or "extra-legal"?) postulate as that the human will is inherently entitled to respect. (We might also add the observation that the will of parties is only one of several possible criteria to which the law—if this personification is permissible—may refer for the determination of the existence or the content of a legal obligation.)

We can thus give credit to Hägerström for having shown that many legal theories, even those of the so-called positivists, are infected with extra-legal, moralistic, "natural law" ideas. This does not, however, mean that he was a "pure legal theorist" of Kelsenian type, seeking to purge legal thought from such infection. That is not praise which he himself would have welcomed. Indeed, there are many passages in which he seems deliberately to reject or to close his eyes to any distinction between law and morals. He is reluctant to allow that words like "right," "obligation" and "ought" can be used otherwise than in their "ordinary sense" as referring to something which is not a mere creation of legal thinking but has an independent moral existence (see pp. 200 *et seq.*, esp. pp. 207–8 and p. 216). The explanation is that his attack was launched on a wide front, or, rather, on several fronts at once, and he was in no mood to make nice distinctions between his enemies. The enemy was the enemy wherever found, and the enemy was Metaphysic, the Metaphysic which pretends to hypostatise its concepts. Against these ranks of unsubstantial ghosts he swung his critical sword. *Praeterea censeo metaphysicam esse delendam* was, so Professor Olivecrona tells us, his chosen motto. Not merely in the province of jurisprudence but in the whole realm of ethics did he deny the reality of objective values corresponding to our talk of rights and duties. He argued that in actions which we call "desirable" there is not to be found any real, existent property of "desirableness"; our judgment indicates nothing more than an association in our own minds of a feeling of pleasure with the idea of the action. So our judgments of goodness and badness, right and wrong, claim and duty correspond to nothing really existent beyond our own feelings and impulses. All that lies behind the sentence, "This is my duty," is the association of a feeling of conative impulse with the idea of an action. Thus there can be no science of duties but only a science of our ideas of duties. Legal philosophy, if it is to be factual and scientific, must content itself with the analysis of concepts and ideas as they are actually used and with a factual study of the actual working of legal institutions. Ethics and jurisprudence must be replaced by psychology and sociology. Such appears to be the conclusion of his destructive criticism.

Like other radical critics who profess the laudable object of cleansing jurisprudence of fictions and setting it in the way of sound and healthy growth, Hägerström seems in danger of throwing away the baby with the bath-water. Duguit wanted to abolish the traditional concepts of right and duty and to construct a jurisprudence founded on the sole duty of social solidarity, but the duty of social solidarity brings us into relations with others and these relations must be analysed and classified—they are what traditional lawyers mean by rights and duties, whether we call them by these names or not. Frank and other American realists want to abolish the notion of legal rules and to construct a jurisprudence based on a factual study of what the courts do and of the psychological idiosyncrasies of judges, but an important factor influencing the judge's mental processes is his intellectual appreciation of what he and others believe to be rules of law, and so the activities of courts cannot

be predicted without taking into consideration the rules of law as they are understood by lawyers. So, whether or not Hägerström is right in holding that our notions of right and duty, whether legal or moral, correspond to nothing real in the sense in which facts are real (but let the philosophers tell us whether "facts" are really any more real than values), it remains true that we cannot talk about them, analyse them, or combine them in such a way as to produce practical conclusions for action otherwise than *as if* they corresponded to something. The only other course we can adopt with them (and this would indeed be emptying out the baby) is to stop talking about them all, and so put an end not only to theoretical jurisprudence but to all practical legal activity, and indeed to all ethical activity.

For law is not merely a theoretical science. Men study law in order to guide their actions, the judge in order to decide cases brought before him, the advocate that he may persuade the judge to a decision in favour of his client, the solicitor that he may advise his client to a course of action which, if brought before a court, will be approved by the court, and the layman in order that he may similarly regulate his own actions. All this involves judgments that actions are right or wrong, good or bad, if only by the standard of the law; it implies that the values of the law have some meaning. And so they have, if disregard of them may lead to imprisonment or fine or the payment of damages.

Hägerström would have us reject not only the idea of legal values but also the idea of moral values. But can we do this without abandoning the whole effort of ethical thinking and the whole possibility of ethical acting? Even if moral values have not so clear a factual significance as legal values in that disregard of moral rules does not lead to consequences as physically perceptible as imprisonment, yet the idea of values is equally implicit in all thinking, and in all consequent acting, in terms of "ought."

Tamen usque recurret. Is even scientific thinking always free from the idea of values? It may be so where the scientist's work is confined to pure experiment and observation. But observations have to be recorded in words and words often carry overtones of evaluating judgment. When the sociologist (whom our modern anti-metaphysical jurists would have us copy) begins to talk of certain forms of society as "advanced" or "backward," "progressive" or "unprogressive," there is at least a suspicion that in his mind these terms are not purely objective descriptions but involve a judgment of good and bad. And surely the applied sciences, where scientific knowledge is used as a guide to practical action, involve such a judgment. The doctor consciously and deliberately applies his scientific knowledge to produce a state which he calls "health" and judges to be good; the psychologist, even when not actually practising as a psychiatrist, seems to favour the sane and balanced mind as against neurosis and insanity. It is only because in these matters the predilections of the scientist coincide so generally with those of the common man —few, if any, would advance the proposition that disease and insanity were in themselves good things—whereas there is less unanimity about what is right and good in matters of ethical conduct, that the dependence of science on a belief in values passes unnoticed. The Hägerströmian critique rigorously applied would result in the emptying of a good many bath-tubs, babies and all.

The writings of Hägerström presented in this volume are critical and destructive. From Professor Olivecrona's Preface we learn something of Hagerstrom's positive contribution to our understanding of law. This, it appears, is mainly to be found in his great work on *Der römische Obligationsbegriff*, the first volume of which (1927) was, perhaps through misunderstanding of its thesis, unfavourably received by the experts on Roman law, while the second volume (posthumously published in 1941) passed almost unnoticed. Hägerström believed that legal ideas "could be properly understood

only through a combination of analysis and historical research; they had to be traced back to remote origins in primitive society." Pursuing this research into such concepts as *jus, dominium, possessio*, he came to the conclusion that they were originally concepts of religion or magic. ("*Justum, e.g.*, originally means 'pure' in a religious sense, as in *justum piumque bellum*.") By magical beliefs he seems to have meant "every kind of belief in the possibility of producing desired effects by other means than those belonging to natural causality." (It might, however, be asked whether primitive magic does not operate with natural causality as the primitive mind understands it.) Thus to the primitive mind such terms as *jus*, etc., indicated a magical power which one man was thought to exercise over a thing or over another man, and the old legal acts such as *mancipatio* and *stipulatio* were originally magical acts for the creation of such powers by ritual words and gestures. As the practitioner of magic commonly believes himself to produce an effect by representing it or by solemnly proclaiming its occurrence, so in *mancipatio* the acquirer believed that by the solemn assertion *meum esse aio* he created the supernatural power which the Romans called *dominium*, and, because his fellow-citizens shared his belief and so tended henceforth to respect his control over the thing, he did in fact create a real social power. Even with the waning of conscious religious faith the belief survived that legal concepts, both of public and of private law, corresponded to something invisible but real. Hence the strength of Roman law as compared with the law of the more sceptical, rationalistic and empirical Greeks.

Obviously this thesis is too profound and far-reaching to be discussed on second-hand information within the limits of a review. But whether or not the Romans did think in that way, we can agree with Hägerström that many people do think in that way and that, if people think in that way, it influences their actions. "One fights better if one believes that one has right on one's side." To this we may add the testimony of Grotius (*De Jure Belli ac Pacis, Prolegomena*): "Quantam vim habeat in bellis justitiae conscientia, passim ostendunt historiae scriptores, qui victoriam saepe huic causae praecipue asscribunt." The *Kampf ums Recht* would be feeble if we did not believe in the existence of what we are fighting for. If we believe that values have an objective existence, we may fight and even die for them as we should not do if we held them to be no more than tools of thought or (as Hägerström would persuade us) mere descriptions of our own states of mind. Perhaps it is as well that Hägerström's critical writings are too difficult for the plain man; the result of universal acceptance of his conclusions would be chaos and anarchy. The augurs of jurisprudence may privately indulge their scepticism but it is necessary that the vulgar continue to believe in the gods.

To sum up. Hägerström's attempt to make jurisprudence "scientific" by eliminating the idea of objective values seems misconceived. We cannot conduct any practical science on the sole basis of the empiric knowledge that a leads to x while b leads to y. We must, if we are not to relapse into chaotic drift, choose whether we are going to aim at x or at y; we must decide whether x or y is the better end; we must have value-judgments. Whether or not our values are "real" in the same way as facts are "real," they are necessary to our thought and to our consequent practical action, and on our choice between them will depend the factual consequences of our action. Where Hägerström has done good service is in exposing the metaphysical assumptions which underlie traditional legal positivism and in showing that the ideas with which the lawyer works are just as "unreal" (or as "real") as those with which the moralist works, and, above all, in demonstrating the immense practical importance of the ordinary man's belief that our ideas of right and wrong do correspond to something real.

A. H. Campbell.

The English Trial and Comparative Law. By C. J. Hamson and T. F. T. Plucknett. [Cambridge: W. Heffer & Sons, Ltd. 1952. 48 pp. 2s. 6d. net.]

Law Reform and Law Making: A Series of Seven Broadcast Talks. [Cambridge: W. Heffer & Sons, Ltd. 1953. 91 pp. 5s. net.]

Those who were unable to listen in to these two series of broadcast talks will be glad to have the opportunity of reading them, and many of those who heard them on the air will doubtless wish to have them in permanent form. We must be grateful to Messrs. Heffer for giving us this opportunity of seeing them in print.

It would be interesting to know the composition of the audience: I imagine that they would mostly be lawyers. If this be so I would like to congratulate Mr. Hamson on the stimulating and lively way that during the first of the series he put over the case for comparative law methods, and linked it with the trial, an institution with which most lawyers are fairly well acquainted. It is to be hoped that he roused the interest of his listeners, so as to make them want to go on. I enjoyed Professor Plucknett's fascinating and scholarly concluding talks on the historical side of the subject. Some of the hearers would no doubt be laymen, and it is to be hoped that their interest was duly stimulated.

Mr. Hamson's work is marred from time to time by exaggeration of statement, particularly in the first series to which the immediately following remarks are mainly directed. He says, for example, that even in criminal cases "in the majority of the instances there is no real issue of contested fact submitted to and resolved by the jury" . . . "indeed, what is regarded as the classical type of an English criminal trial—a ding dong conflict of evidence upon an issue of fact resolved by the verdict of a jury—is statistically so rare as to be almost an anomaly." This is an extraordinary statement: nine-tenths of the criminal trials in which I have taken part or at which I have been present have in fact involved such conflicts of evidence. Again "*all* the evidence must be produced in open court by word of mouth." If Mr. Hamson would spend a week in the Commercial Court some time he might well see a number of cases dealt with in succession without any oral evidence being called at all, while in the Chancery Division the actions are divided into witness and non-witness actions, and in ordinary King's Bench actions a substantial proportion are of a type in which all the really important evidence is contained in bundles of agreed correspondence.

Much the most serious of these exaggerations is the one which suggests that the confessions which figure so prominently in our criminal trials are frequently not genuine. This is likely to be fastened upon by Communist commentators, and used as a stick for beating the whole English system of criminal justice. At p. 27 Mr. Hamson makes the serious, and, I believe, quite unfounded allegation that confessions are frequently extracted from prisoners "in the dark purlieus of a police station." I would not like to say that this never happens, but I am satisfied that it is not at all common. Moreover, Mr. Hamson states that confessions are much commoner now than in the past—the innuendo being that the conduct of the police has got worse. I should be glad to know what evidence there is for this statement. During the thirty years I have been concerned with the work of criminal courts I have not noticed such an increase, but I cannot claim more than a local experience. The trouble is that Soviet writers well aware of the unfavourable impression which the automatic confessions of the typical Russian political trial make upon the unideological observer have been emphasising this point about confessions at British trials which is now made by Mr. Hamson. As far as I know they have never succeeded in producing evidence in support of their allegations, but now they will be able to call to their aid the statement of a distinguished professor of law at Cambridge.

The truth of the matter of course is that most criminals when arrested, or even when interrogated, become frightened and own up at once. There is an obvious danger of over pressure by the police in such cases, but this has been realised for over a century, and an elaborate system of protection, centring round the Judges' Rules has been built up. While one could hardly contend that this is completely effective my own impression is that it works pretty well and it has certainly been subjected to little detailed criticism. English criminal trials take place in such a glare of publicity that I cannot imagine any widespread infractions of the Judges' Rules going undetected. Modern criminals are alive to their rights, and would undoubtedly react to any extensive use of "third degree" methods in "the dark purlieus of police stations."

It is a pity that Mr. Hamson should have marred an otherwise excellent piece of work by such exaggerations. For he brings out with proper pride the salient features of the common law method of trial which is as good as any method for getting at the truth in matters which are in dispute, so far devised in this imperfect world, and quite possibly the best.

Mr. Hamson's opening talk in the second series, though not free of high colouring, is better balanced, and provides an excellent introduction to the six following broadcasters who deal in turn with The General Problem of Law Reform (Dr. Goodhart); The Reform of Equity (Denning L.J.); The Rent Acts; Administrative Law (Professor Wade); Contract (Professor Glanville Williams); Criminal Law (Professor D. Seaborne Davies); Law Making (Sir Cecil Carr): Mr. Hamson himself dealing almost exclusively with the part played by the judiciary in legal reform. From such an excellent team, for the assembling of whom somebody (is it Mr. Hamson?) deserves much praise, we naturally get a balanced and informed discussion which it would be something of an impertinence to discuss in a short note such as this. I will, however, permit myself three observations. The need for a drastic reform of the Rent Acts is known to, and accepted by, pretty well every literate person in England; the only real obstacle is of course lack of courage in our politicians. Mr. Megarry, whose name does not appear upon this booklet, presumably because of a well known and somewhat overstrained sensitiveness among practising barristers about advertising, had no particular difficulty, therefore, in making his case for reform, but the lucidity of his exposition of what is accepted to be one of the most complicated branches of modern law is beyond praise. The backward condition of our criminal law is not so generally realised, either in the profession or without, and Professor Davies's robust tackling of this problem must have come as a surprise to many: on the whole I thought that this talk came nearest to realising my own idea of how such a talk should be constructed.

It is astonishing how few people know in more than the vaguest way how statutory law (either Acts of Parliament themselves, or subordinate legislation) actually gets on to the Statute Book. For such there could be nothing better than Sir Cecil Carr's two talks in this series. They are concerned with the actualities of the present time rather than with improved methods, which is a pity, because, models of their kind as they are, I should have liked even more to have had the author's proposals for improving what he admits is a too complicated piece of machinery: there is certainly nobody better qualified to make proposals.

C.

THE STRANGE CASE OF ALGER HISS. By THE EARL JOWITT. [London: Hodder and Stoughton. 1953. 279 pp. (with Index). 20s.]

IN assessing the contribution made by this remarkable book to the evergreen controversy about the conviction of Alger Hiss for perjury, it is necessary to bear in mind the particular angle from which it has been written, and by this

is meant not the political outlook and beliefs of the author (though these cannot be left entirely out of account) so much as the particular approach he has adopted to the investigation of the matter.

Mr. Alistair Cooke's *A Generation on Trial* was the work of a skilled reporter who was on the spot at the time and was present during almost the whole of the two trials and the proceedings before the House Committee. The author endeavoured to set the proceedings against their background in the American political scene, and was brilliantly successful in his undertaking.

Earl Jowitt approaches the case from an entirely different angle. He attempts a sober examination of the full transcript of the second trial, viewed in the light of the additional evidence which has since been provided by the appearance of Whittaker Chambers's autobiography *Witness*. He brings to this task exceptional qualities because of his experience as an advocate and judge, but it must be remembered that he had not the advantage of following the proceedings at first hand. If this book is to be judged fairly, it must surely be with these considerations in mind. The question is, whether, writing within these limitations, the author has achieved a useful purpose.

Earl Jowitt's purpose, so he tells us, was to provide a dispassionate review of the evidence "from the detached point of view of a lawyer," and, it may be remarked, a very English lawyer at that, and to underline the doubts which he felt in reading the transcript, which led him to conclude that the case against Hiss was, to say the least, not proven.

There is a secondary object which the book may be said to serve, and that is to provide a commentary upon certain aspects of American court procedure and practice which differ from the English practice. The following are some of the differences which are noted: the greater control which counsel appear to have over the conduct of the proceedings, the wider interpretation given to the rules of evidence with regard to relevancy and cross-examination as to credit, the latitude allowed in pleading the rule against self-incrimination, the more extensive right allowed to the press to comment on judicial proceedings and the laxity with regard to contempt of court, the wide use of the right to challenge jurymen, which enables the accused virtually to select the jury which shall try him, the absence of any summing-up by the judge except on points of law, and lastly, the latitude allowed to counsel for the prosecution to introduce a new theory in his closing speech. No doubt many of these differences may be attributed to an extremely generous interpretation of the rules of evidence and procedure on the part of the trial judge, but, even after allowing for this, the fact remains that there are significant differences in American court practice as compared with our own.

Earl Jowitt's method involves marshalling all the evidence relating to each topic in separate chapters, so far as possible, and this is quite helpful to the reader, who would otherwise find the issues extraordinarily complicated and confusing. But let no one suppose that this book is a complete guide to the *Hiss* case. As has already been observed, it does not set out to be more than a commentary on the second trial. In fact, it presupposes a certain amount of prior knowledge of the case as a whole, and it would be difficult to follow if one were starting from scratch. It has received a rather mixed reception, but the present reviewer doubts whether anyone could have written a more intelligent commentary, working almost entirely on the basis of the transcript. The commentary has the character and style of its author firmly stamped upon it, and if at times the reader is puzzled by the incredulity of the writer, who appears to refuse to believe that human beings could possibly sink so low as the evidence makes out, it is at least enlivened by these personal observations.

There remains what is, to English lawyers, the "billion dollar question." Had Alger Hiss been tried in an English court in accordance with English procedure and practice, is it likely that the jury would have reached the same

conclusion ? The view has been expressed in some quarters that the result would probably have been the same. Earl Jowitt does not really answer this question, though his book must be regarded as essential reading for those who desire to make up their minds one way or the other.

J. E. Hall Williams.

Historical Introduction to the Study of Roman Law. Second Edition. By H. F. Jolowicz. [Cambridge : at the University Press. 1952. 596 pp. 60s. net.]

In the first edition of this work, which appeared in 1932, the author had three aims. The first and main objective, as is apparent from the title, was to give an historical background to the law of Rome, rather than the law itself—to serve as a supplement to existing textbooks, particularly those of Buckland. As subsidiary to this, and indeed flowing from the main object, his purpose was to produce a text intelligible to any reader, even those who had no acquaintance with Roman law (and presumably also including non-lawyers). The third aim, not specifically mentioned by the author in the first edition but referred to in the second, was to stimulate the more advanced reader of Roman law who wished to dig more deeply into certain topics—the sort that would thrive on controversy and speculation. These ends, although to some extent complementary to each other, do not always pull in the same direction, and it was a considerable feat that the author was able to achieve all of them with such conspicuous success. The book aroused great interest in legal as well as non-legal circles, and has been used as a standard work not only for legal studies but (to the reviewer's knowledge) also for the ordinary run of classical studies. In particular, the general sections on "external" legal history, such as those on the constitutional and social developments in Rome, the sources of law and the general characteristics of the Roman legal system, are easily readable, are written with deep insight into, and thorough appreciation of, Roman affairs, and were sure to appeal to all classes of readers. Perhaps, however, the chapters on the legal institutions themselves are not quite on the same footing. Though done with remarkable clarity and skill, it was possibly too much to hope that they would appeal in equal measure to all whom the author had in mind.

The new edition has maintained the pattern of the old. There are not many major changes in the text. There are rather more in the footnotes, but most of the new matter is to be found in an appendix which comprises various passages "ranging from notes that consist of nothing more than an additional reference or two to little essays on particular subjects." (Preface to second edition.) The system of cross-reference to the text and footnotes is excellently done, and the most important parts of the Appendix are listed in the Preface. No doubt considerations of printing costs partly dictated this method, but it also seems that the author limited himself to textual alterations only where he had changed his mind, or where he thought the student would gain from the alteration. This method involved some sacrifice of continuity, which may also in some degree be attributed to the author's desire to cater for so many appetites. However, it should be borne in mind that it is a wise and safe way of re-editing a history of Roman law. The study of Roman law has always produced an immense literature, and since 1932 there has been no abatement in output. Much of the new literature, like the old (as is natural in a field where concrete evidence and direct sources are often meagre), is in the nature of speculation and conjecture—often very ingenious and sometimes even very probable, but nevertheless not yet definite and convincing. The author, probably having in mind the way in which the discovery of the new Gaius fragments showed (as indeed did that of the Veronese Gaius) how wide of the mark many theories had been, has followed the path of caution and restraint.

He has altered the texts only where newly discovered fragments or inscriptions have brought new information to light, or where very convincing argument has prevailed, and left the other matter for the footnotes and appendices. Apart from the changes in the description of the early *legis actio* and *societas* already introduced in the revised reprint of 1939, the main alterations concern the composition of the *comitia centuriata* after the "democratic reform" in the latter half of the third century B.C. (as a result of a newly found inscription—see p. 20 and App. p. 568), and the question of dual citizenship in Rome. Professor Jolowicz now accepts that a certain degree of local citizenship was allowed to inhabitants in certain municipalities in addition to their wider Roman citizenship, and has modified Mommsen's theory of the incompatibility of Roman citizenship with local citizenship; though he does not accept de Visscher's new theory on duality of citizenship in full, he also thinks that the Roman system allowed members of municipalities who were Roman citizens to be governed to some extent by their local law. (On these aspects a new inscription from Rhosos and, to a lesser extent, the new Cyrenean edicts have influenced the altered views (see pp. 60–2 and App. pp. 542–7).) He also accepts a later date for the first appearance of coinage in Rome (early third century B.C. instead of middle fourth century—see p. 146).

In some cases the author re-assesses views set out in the first edition; for instance, whether manumission in earlier law always gave citizenship in addition to liberty (see p. 138). As a result partly of de Visscher's new writings, he seems to conclude that the basis of distinction between *res mancipi* and *res nec mancipi* was not only agricultural (as previously believed), but probably was also military (App. pp. 552–4). He now also inclines more to the view that before the *lex Aebutia*, the *formula* was already available in certain cases and that there was less differentiation between *jus civile* and *jus honorarium* in Republican times than there was in classical law (pp. 230–1). There are important and valuable additional essays in the Appendix on the nature of early *mancipatio* (pp. 554–6); on the jurists of the principate and the *jus respondendi* (in which views expressed since 1932 are collated and considered, though they do not lead to a marked change in Professor Jolowicz's own views (pp. 570–4)). A most stimulating essay is devoted to the subject of pre-Justinian interpolations in classical works, and the author rightly feels with Buckland that the new Gaius fragments have done little to substantiate the view that this activity reached any large-scale proportions, but that nothing more than an occasional gloss was produced—see pp. 581–3.

Only occasionally, perhaps, does Professor Jolowicz stray from his cautious standpoint, and does accept or continue with views that might not be completely established. For instance, he still holds with Pringsheim that the rule, that ownership in sale passes only after payment of the price or the giving of credit, is a post-classical introduction from Greek law (see p. 525), whereas that rule accords so well with the practice of ready sale in the early *mancipatio*. He pays little attention to the view that the introduction of the *lex Aquilia* had something to do with the secession of the *plebs*.

In spite of the author's modest claims, and the method adopted for the new edition, the already high reputation of the book has been enhanced. Professor Jolowicz has again, as he did in the first edition, kept us in touch with all the literature (mainly in foreign languages) on the subjects he deals with; in this respect, his book appears to have almost no parallel in other English works on Roman law. Problems are presented with the clarity and simplicity in which (as foreigners readily admit) English scholars excel. His threefold objective has been maintained with remarkable consistency. While the student might want to avoid footnotes and appendices, the advanced reader will always consult the whole book, not only to look for the direction in which he might dig more deeply (as the author proposes), but also for the author's treatment and assessment of the views of others and for his (the author's) own views, which are set out so competently and carefully, and so free of the dogmatism that

tends to afflict the Roman lawyer in his mildest speculations. He does not always take sides, but has a happy facility of cutting through the strands of academic controversy, and his own views are usually sound and solid, and carry conviction.

B. Beinart.

Gatley on Libel and Slander. Fourth Edition. By Richard O'Sullivan, Q.C., assisted by Roland G. Brown. [London: Sweet & Maxwell, Ltd. 1953. cxxvi and 898 pp. £6 6s. 0d.]

This work is already so well known to and its reputation so firmly established with the profession that it would be superfluous to subject it to a detailed review. The third edition appeared in 1938 and was prepared by Mr. Richard O'Sullivan at the express wish of the author; this edition again enjoys the advantage of the same learned and distinguished editor.

Although it cannot be said that in the fifteen years since the last edition the case-law on this subject has undergone any startling development it remains true that there has been a considerable flow of new decisions, some of them at least of considerable importance, if only as restating or clarifying the law on particular matters in authoritative terms. In this category fall such cases as *Knupffer* v. *London Express Newspapers*, *Turner* v. *Metro-Goldwyn-Mayer*, *Kemsley* v. *Foot*, and *Newstead* v. *London Express Newspapers*. Altogether the editor has added references to some 400 new cases, including many decisions of the courts of the Dominions and the United States. The editor is to be congratulated on continuing the policy of making such citations; this practice is particularly helpful in a subject such as defamation where the basic principles seem substantially to coincide in all common law jurisdictions, and it should increase the utility of the work both in this country and abroad.

But apart from the flow of new decisions needing to be incorporated, the report of the Defamation Committee and the resulting Defamation Act, 1952, have made a new edition essential. The editor, who was himself a member of the Committee, has dealt fully with the effect of the new Act in the appropriate portions of the text, and the Act itself is reproduced among the statutes cited in an appendix. A new chapter has been added on the subject of unintentional defamation as enshrined in section 4 of the Act; a further perusal of the elaborate restrictions placed on this defence reinforces the view that it is likely to prove a good deal less beneficial to the press than was hoped by those newspapers which loudly acclaimed the new Act. The editor is careful to point out the differences in many important respects between the recommendations of the Committee and the statute as ultimately enacted; the difference in drafting between the original section 5 (dealing with fair comment) and section 6 as it now appears in the Act is particularly striking. Reference is also made to changes in the Rules of the Supreme Court introduced as a result of recommendations of the Committee; under this heading fall such matters as Ord. 19, r. 22a (particulars of the facts relied upon in a plea of fair comment); Ord. 31, r. 1a (forbidding the well-known *Plymouth Mutual* and *Elliott* v. *Garrett* form of interrogatories as to sources of information or grounds of belief); Ord. 31, r. 12 (as to discovery); and Ord. 19, r. 6 (2) (particulars as to facts relied on in support of innuendoes).

Particularly welcome to the practitioner is the full and detailed treatment on procedural questions which arise in this highly technical branch of law. Guidance is provided here on the whole range of matters from the stage of the letter before action to that of an appeal. A perusal of this part of the work left the reviewer with the feeling that the practitioner would find most of what he would want in this section of the book, though a rather fuller treatment of the new rules of court (some of which have proved troublesome in practice) might have been helpful. The question of obtaining leave to make a statement

in open court is also dealt with solely in connection with cases where money is taken out of court. An explanation of the procedure where there is no money in court (which is perhaps the more usual case) seems to be called for here.

In dealing with recent decisions the learned editor does not hesitate to criticise where necessary and his carefully expounded doubts as to the correctness of *Longdon-Griffiths* v. *Smith* ([1951] 1 K.B. 295) seem likely to carry considerable weight if this case comes to be judicially reviewed in the future.

The list of forms and precedents has also been brought up to date, as for instance by incorporating a specimen offer of amends and affidavit under section 4 of the 1952 Act. It would perhaps also have been helpful here to provide examples of particulars as required under the new rules of court.

Where there is so much to praise a final word of criticism may perhaps be allowed. 898 pages at 6 guineas does seem rather excessive for what is after all a single rubric in the law of tort. No doubt the citation of Dominion and American cases and the valuable chapters on practice and procedure inevitably add to the bulk of the work; nevertheless a certain amount of repetitiveness is discernible and it is difficult to avoid the feeling that a rather more vigorous form of pruning might have been advantageously adopted. There is a tendency for re-edited legal textbooks to wax unduly fat; and if the metaphor may be pursued, a vigorously applied diet then becomes essential to preserve the health and popularity of the work.

Dennis Lloyd.

The Australian Constitution. Second Edition. By H. S. Nicholas, M.A.(Oxon.), formerly Chief Judge in Equity of the Supreme Court of New South Wales. [The Law Book Co. of Australasia Pty. Ltd. 1952. xxxvii and 458 pp. £3 10s.]

The constitutional law of the Commonwealth of Australia is a neglected field of study outside Australia. Yet to the public lawyer and the student of federal institutions it rivals in interest the constitutional law of the United States, which it resembles in a number of ways. One reason for this neglect may be that the Judicial Committee of the Privy Council has had little to do with its interpretation, except on the rare but spectacular occasions when it has been called upon to make sense of the nonsensical requirement that "trade, commerce and intercourse among the States . . . shall be absolutely free." The main principles of interpretation lie embedded in the *Commonwealth Law Reports*. No one who has examined judgments of the High Court of Australia in constitutional cases can have failed to be impressed by the depth of their learning or the extreme difficulty of many of the issues with which they deal.

Several useful studies in the law of the Constitution have been published since Quick and Garran's outstanding work in 1901. Nevertheless there is room for, perhaps, two up-to-date books: a treatise for practitioners and others, and a students' textbook. Mr. Nicholas's book is presumably intended to fall into the latter category. It is for Australian students and their teachers to decide how far it meets their requirements. A student in another country is entitled to point to defects that impair its value from his viewpoint. In the first place, there are no footnotes. Their absence from some books might be regarded as a virtue; but here materials that should obviously be relegated to footnotes—miscellaneous quotations, names of cases, asides by the author—jostle with fundamental legal propositions to distract the reader. On page 2, for example, where the author is discussing the position of the Crown, we find an account of Professor W. P. M. Kennedy's views on secession from the Commonwealth, a passage from Balfour's speech on the death of Queen Victoria, and a somewhat trite quotation from a recent

article in a French magazine. Again, too little regard is paid to the writings of academic jurists. In the chapter on section 92 of the Constitution there is no mention of the outstanding recent articles by Professors Julius Stone and F. R. Beasley. There are no references to the many illuminating articles by Professor Geoffrey Sawer. The meaning of the "judicial power of the Commonwealth" is examined without any mention of the analyses made by Professors Sawer, Beasley and Zelman Cowen. The provisions of other federal constitutions and their interpretation are introduced into the text in places, but juxtaposition when unaccompanied by adequate explanatory comment can be misleading. Whilst the scope of the work is comprehensive—there is a particularly valuable and interesting chapter on co-operation between Commonwealth and States—it is surprising to find that a study of the Australian Constitution has nothing to say of the Cabinet system and deals only perfunctorily with the discretionary powers of the Governor-General.

Since these words were written the death of the author has been announced. By virtue of his personal qualities and his long experience of constitutional issues he enjoyed high respect in Australian legal circles. The author of the next edition of this book may well feel that he can enhance its value by undertaking a full revision and rearrangement of its contents.

S. A. de Smith.

Stroud's Judicial Dictionary. Third Edition. By John Burke and Peter Allsop, M.A., both of Lincoln's Inn, Barristers-at-Law. [London: Sweet & Maxwell, Ltd. 1952. Vol. 1 (A–D) xxvi and 909 pp.; Vol. 2 (E–L) xvii and 785 pp.; Vol. 3 (M–R) xviii and 941 pp. £3 15s. net per volume.]

On the frontispiece to the second edition of Stroud (1903) appeared a quotation from Emerson which is equally apposite to describe this new edition: "Neither is a Dictionary a bad book to read. There is no cant in it, no excess of explanation, and it is full of suggestion."

Fifty years is an unconscionably long time for a legal treatise to await a complete overhaul, and the practical utility of Stroud became seriously impaired by the inconvenience of having to consult not only the 1903 volumes but also the supplements of 1931 and 1947.

These first three volumes of the third edition generally maintain the comprehensiveness and accuracy of the original author's work. One happy act of editorial rebellion is the expurgation of the "grammalogues" which, with Benthamite ingenuity, Stroud devised in a manner "purposely bizarre for their better remembrance." Most modern users of Stroud will agree with the present editor's condemnation of these abbreviations (*e.g.*, *Vthc* = "See that, or as to that or this, case or cases" !) as "horrifying." Perhaps our forebears were made of sterner stuff.

A further improvement is in the regrouping of the text into numbered paragraphs. This simple expedient renders the text easier to scan and will facilitate cross-references to future supplements. Most of the new material which has been incorporated relates, as would be expected, to statutory interpretation.

The learned general editor, in an over-modest preface, claims only that this edition of Stroud is workmanlike, timely and reasonably priced. He makes no claim that it attains perfection; on the contrary he almost relishes the fact that the critic enjoying an expert knowledge of any particular topic will find all too many flaws.

Certainly there are a number of surprising errors and omissions. The repeal and re-enactment of section 46 (6), Local Government Act, 1894, by

section 63, Local Government Act, 1933, is overlooked at p. 10, para. 6. Under Accounts, at p. 31, *R.* v. *Minister of Health, ex p. Dingle* [1950] 1 All E.R. 875, should be cited in para. 3. The meaning of "carat" was considered by Pritchard J. in *Westwood* v. *Cann* [1950] 2 All E.R. 805. At p. 451 *I. R. C.* v. *Anti-Vivisection Soc.* [1946] K.B. 185, is cited without any indication that the decision was affirmed by the House of Lords; see [1948] A.C. 31. Yet at p. 455, para. xii, the affirmation is noted but only by a reference to the *Law Journal Reports*.

It is indeed unfortunate that no consistent policy of case citation seems to have been adopted. Throughout the volumes the choice of the Report series to which reference is given appears to have been made quite arbitrarily. For example, at p. 719 only the *Times Law Report* reference is given to *Smithwick* v. *N. C. B.* which is reported in [1950] 2 K.B. 335. One would have thought that the simplest and most commendable rule would be to cite reports other than those of the Incorporated Council and the All England series only where these latter have defaulted.

At p. 455 (para. xvi) *Gibson* v. *S. American Stores* [1949] 2 All E.R. 985, is stated as deciding that the company's benefit fund was *not* charitable and there is a misprint in the page reference to the report. Other misprints which were noticed are in the spelling of *O'Dea* v. *Tetau* (p. 270) and *Zeidman* v. *Owen* (p. 2228).

The treatment of False Imprisonment is rather cursory — a simple quotation of two lines from Cowel's *Interpreter* (1672). Might not *Christie* v. *Leachinsky* [1947] A.C. 573 have been cited? "Invitee" gets a mere eight lines and from reading together pages 1511 and 1643 it would appear that the House of Lords classified the female appellant in *Jacobs* v. *L. C. C.* [1950] A.C. 361 as both an invitee and licensee. The decision of the Court of Appeal on the nuisance aspect of *Stone* v. *Bolton* [1949] 2 All E.R. 851 (reversed by the House of Lords on the issue of negligence) ought to be incorporated into the text since it offers some useful guidance on the problem as to whether isolated acts may constitute that tort.

Undoubtedly these and other points will be rectified in the promised periodical supplements.

It is always tempting for the enthusiastic reviewer to describe a general reference treatise as "indispensable" to the practitioner. Stroud, more than most, is worthy of that epithet. It is most certainly the best available work of its type.

The final volume of text (S–Z) is expected in the near future.

Eric C. E. Todd.

Cockle's Cases and Statutes on Evidence. Eighth Edition. By L. F. Sturge. [London : Sweet & Maxwell, Ltd. 1952. lvii and 546 pp. (with index). Price 35s.]

This is the second occasion on which Mr. Sturge has been responsible for editing Cockle's *Evidence*, and he has pretty well contented himself with bringing the volume up to date, which he has done with competence. On the previous occasion he gave us a number of useful new notes in which he sometimes indicated a point of view at variance with Cockle. This time the only substantial change, as far as I have been able to see, is the chapter on Presumptions which as indicated in the Preface has been rewritten "to bring it more into line with present-day thought on the subject." Present-day thought on the subject treats Presumption and Burden of Proof as all one subject. Mr. Sturge is aware of this, and it is therefore difficult to understand why he should deal with them separately. Moreover, his treatment of the

recent cases, especially those on divorce, where these problems have been very much discussed, are rather perfunctory. Cases like *Dunn* v. *Dunn* [1948] 2 All E.R. 822 and *Emmanuel* v. *Emmanuel* (1945) 61 T.L.R. 538 in which Denning L.J., who on this matter is a most influential exponent of "present-day thought," expressed his views, are not referred to, nor are the important articles in 61 L.Q.R. 538 and 12 M.L.R. 273—incidentally it would be an advantage in a book like Cockle which is much used by students, if references were given to articles in the learned periodicals. Nor is there any real attempt to explain the "acute conflict of opinion" shown in *Ginese* v. *Ginese* [1948] P. 179 and *Gower* v. *Gower* [1950] 1 All E.R. 804.

A point on p. 103 is perhaps worth noticing. It is there stated that dicta in *R.* v. *Sims* ([1946] 1 K.B. 531) were disapproved of in *Noor Mohamed* v. *R.* ([1949] A.C. 182). A student might not be aware that a Privy Council case does not overrule a decision of an English court, so that it is not at all clear how far *R.* v. *Sims* is to be regarded as discredited. Incidentally we think that the student is entitled in a case book of this kind to rather fuller notes on the recent cases than Mr. Sturge gives him: often he is content with the words see *A.* v. *B.* and *C.* v. *D.*, and I cannot find that any of the recent cases referred to receive longer discussion than three or four lines. Another point is that Appendix 4 on Supplemental Matters seems to have got left out.

C.

Oaths and Affirmations. By D. Boland, m.b.e. and B. H. Sayer, ll.b. [London: Stevens & Sons, Ltd. 1953. xix and 160 and (index) 5 pp. 16s. net.]

It is more than twenty years since the last edition of *Stringer* was published, and the authors of this book have provided a new and up-to-date substitute. The fifty-four pages of text deal with persons authorised to administer oaths, their administration, evidence by affidavit and deposition, evidence before particular tribunals, oaths of allegiance and unlawful oaths. Though adequate for most purposes, the treatment does not always purport to be exhaustive (pp. 4, 5), and it is sometimes too concise to be complete. Thus the statement (p. 34) that a statutory declaration cannot be used in any court of justice is based on the Act of 1835, but omits such exceptions as those in the Criminal Justice Act, 1948, s. 41, and the Magistrates' Courts Act, 1952, s. 79. Over 100 pages are occupied by appendices. The first two set out some statutory provisions and rules, while the third deals with applications for commissionerships. The fourth contains forms relating to affidavits, exhibits, and oaths or affirmations for witnesses, jurors, interpreters, shorthand writers, bailiffs, shewers, tryers and other persons on a variety of occasions, and also translations under the Welsh Courts Act, 1942, and Rules of 1943. The reader may be surprised to find over 150 forms, and the appendices should prove most useful to commissioners and officers of court.

The authors, who are themselves officials at the Law Courts, assume without discussion the value of oaths in the legal system. Nevertheless Mr. Justice Mellor, one of the judges on the trial for perjury of the Tichborne claimant, is reputed to have advocated the abolition of judicial oaths eighty years ago (*Best*, 46, 159); and others, including the members of the Evershed Committee (Cmd. 8878, para. 247), have doubted the general efficacy of an oath to ensure truthfulness in witness-box or affidavit. As the religious sanction has been abandoned for affirmation and some statements by children, the replacement of both oath and affirmation by a warning of prosecution under an amended law of perjury may merit consideration. Then again, though the authors provide forms of oath for non-Christian witnesses (pp. 112–5), they do not revive Anstey's discussion of the futility of many "Judicial Oaths as Administered to Heathen Witnesses" (*Juridical Society*, iii, 371). Hence we must wait for a

more elaborate book to treat of fundamentals. But it would be unappreciative of sound work to complain that the writers have failed to do what they did not attempt. For the subjects comprised within its limited framework, this book may be commended to all concerned.

G. D. Nokes.

Der Grundsatz des Entscheidungseinklangs im internationalen Privatrecht: Ein Beitrag zu der Lehre vom Renvoi. By Professor Max Pagenstecher. Akademie der Wissenschaften und der Literatur in Mainz, Abhandlungen der Geistes- und sozialwissenschaftlichen Klasse, Jahrgang 1951, no. 5. [Verlag der Akademie der Wissenschaften und der Literatur in Mainz in Kommission bei Franz Steiner Verlag G.m.b.H. Wiesbaden. 1951. 68 pp. Dm. 5.40.]

The termination of the existence of the German Reichsgericht in consequence of post-war developments has rendered it possible for German jurists to discuss once more problems of a fundamental character which seemed to have been "settled" for good by the Reichsgericht. The Federal Supreme Court at Karlsruhe has on more than one occasion shown a welcome spirit of independence and has loosened some of the fetters of tradition which even in a civil-law country may restrict the freedom of courts not hampered by a formal doctrine of the binding force of precedents. It is generally recognised that one of these fields in which the former Reichsgericht has often failed to carry conviction is that of private international law. The present work is devoted to the constructive criticism of one of the basic doctrines of the Reichsgericht in this sphere of law, *i.e.*, the doctrine of renvoi. This doctrine has been approved by the Reichsgericht in the form in which it has been adopted by many other Continental legal systems, though not by the courts of this country. Whenever there is a reference in a foreign legal system to German law, a German judge must apply German substantive law notwithstanding the fact that the reference in the foreign law may be to German law *in toto*, *i.e.*, including the German rules of private international law. The German judge will therefore apply German substantive law by reason of a renvoi contained in a foreign legal system, notwithstanding the fact that the foreign court will on its part apply another legal system by reason of a rule of the German conflict rule. In other words, the Reichsgericht applies the renvoi doctrine in its crudest and most nationalist form, not in the somewhat more refined form which the English courts through the adoption of the "foreign-court-theory" have developed.

It is the merit of the present work to have shown convincingly that the rule contained in article 27 of the Introductory Code or the Civil Code did not tie the hands of the German courts. It would have been possible to interpret this inconclusive rule in a manner perfectly compatible with an entirely different theory, such as in fact the author of the present work recommends. The author's view is that in principle a renvoi should be rejected, but that this rejection should be modified in the interest of the establishment of uniformity of decisions between the courts of the various interested countries. Briefly, the author's suggestion is that a renvoi should be accepted only in those cases where the acceptance results in uniformity of decisions between the two countries in question and that a transmission should be accepted only where it results in uniformity of decisions between the law of the country to which the *lex fori* refers and that of the country to which the transmission leads. The author points out that his theory produces uniformity of decisions between a country, such as Germany, where the simple form of the doctrine of renvoi prevails, and a country where—as in this country—the refined form or foreign-court-theory is recognised.

Assuming a national of this country dies domiciled in Germany, an English court would apply English law if a German court would apply English law, while, of course, at present the English court applies German law just because the German court interpreting the English doctrine as a "renvoi" applies German law. By rejecting the renvoi from the point of German law the author therefore achieves uniformity of decisions wherever the non-German law adopts the foreign-court-theory.

The author argues forcefully for his theory and has fortified his argument by a number of very well-chosen examples which he discusses with great thoroughness. If his thesis remains unconvincing to the present reviewer, this is due to two considerations. In the first instance the learned author's argument is based on the twin suppositions that uniformity of decisions results from the application of the same legal system by the courts of two different countries and from the further supposition that uniformity of decisions is a desirable goal to aim at. In the second instance the learned author—following in this respect the train of thought of the adherents of the doctrine of renvoi—assumes that it is practicable for a court to consider in every case in which the court has to solve a conflict of laws problem what the attitude of the foreign conflict system to this question is. Both assumptions are unproven and unprovable. The doctrine of renvoi is a typical product of the optimistic trend of thought of the late nineteenth century. At that time of unbounded—and unfortunately unjustified—confidence in the development of the civilised world it was possible for—say—an English, German or French court to believe that there was a distinct advantage in striving towards a state of affairs where the succession to the estate of X.Y. would be decided alike in, say, France, Germany, Russia and Czechoslovakia. It was even possible to think that the difficulties arising from the necessity of considering what attitude Abyssinian legal science adopted towards the problem of classification would be merely temporary. Finally, it was not at all impossible to believe that, say, the German Marriage Law of 1938 would be interpreted in an identical manner by the courts of Belgium and Czechoslovakia. This comfortable position no longer exists. The division of the civilised world into two halves exists and looks like a feature of some stability. One of its consequences is a relapse into a state of primitivity over large parts of the globe. Another is the complete incompatibility of moral, and consequently of legal, views on points of fundamental importance held within each of the two halves. New States are coming into existence at an alarming speed in consequence of the rise of native nationalism. It is absurd to inquire for the private international law of a country, whose judges possess no legal training, either because they are "people's judges" or because they have only very recently learned to read and to write. It serves no useful purpose for a court in the Western hemisphere to decide a case which is before it in one way for no better reason than because a Roumanian court, sitting in a country where completely different social and economic conditions and diametrically opposite ethical views prevail, decides it in this way.

Private international law—like public international law—requires a great deal of fundamental rethinking in order to correspond to the actualities of our times. Those who have some experience of the practical tasks with which it is daily confronted will only too frequently feel that a great deal of our finely spun doctrines has lost touch with the realities of our day. The author has the great merit of having opposed on principle the doctrine of renvoi, which constitutes one of the more deplorable aberrations in this field of law. Even those who—like the present reviewer—feel that the concessions made by him to his opponents go too far and that uniformity of decisions is worthless in a divided world, will feel grateful for a thoughtful contribution to a debate which, one must hope, will lead to a fundamental reordering of the bases of the theory of the conflict of laws.

E. J. Cohn.

Hayes and Jarman—Concise Forms of Wills. Eighteenth Edition. By K. W. Rubin, ll.b., Barrister-at-Law. [London: Sweet & Maxwell, Ltd. 1952. 321 and 9 (index) and xc (Tables) pp. £3 10s. 0d. (with Supplement, 36 pp.).]

This new edition of a well-known short precedent book contains substantial alterations and improvements. The precedents show a considerable change of emphasis, much more attention is paid to business and to ordinary small estates, much less to settlements of land. This is a welcome reform and one which will make the book of much greater use. In his preface the editor confesses, however, that the work of recasting is not yet complete. This is perhaps unfortunate, since the change in tone in the precedents contrasts with the old-world flavour of some of the notes. The number of testators of whom one must ask what they wish done with their landaus, ralli-carts and phaetons, or even with their monoplanes and biplanes (as distinct from mere aeroplanes) must be limited. This is perhaps an unfair example, but it does illustrate a general weakness, which is apparent also in references to other standard works. Thus, at p. 83 the reference to Williams on *Executors* is left in an unspecified edition which is certainly not one of the last two, at p. 87 old cases long before the Land Transfer Act, 1897, survive in the discussion of the meaning of personal representatives which are now of doubtful importance. In many instances more recent cases could be incorporated with advantage, *Re Lory's W. T.* [1950] 1 All E.R. 349 on the meaning of "land" in relation to incorporeal hereditaments, *Re Lilly's W. T.* [1948] 2 All E.R. 96 in the context of shares and investments, *Re Wood (decd.)* [1949] 1 All E.R. 1100 in connection with animal trusts and the like, *Re Fison's W. T.* [1950] 1 All E.R. 501 on the effect of giving an option on incumbered land or even *Re Wynn's W. T.* [1952] Ch. 271. No doubt older cases on these and similar matters are good authorities, yet if the book is for handy use its utility will be enhanced if the authorities discussed are also easily accessible. It could also be said that some of these are too recent, yet they are to be found in books of about the same date.

New to this edition is an introductory chapter on the matters to be considered on drafting. Here there is much that is of value (though at p. 2, Lord Kingsdown's Act might be mentioned), and the chapter deserves careful attention and is concerned with up-to-date matter.

The rest of the book takes the usual form of a precedent book, and the real test must be in use. Comments based upon reading can therefore be misleading. On the whole it seems that the danger of splitting the notes too much or of having duplication has been avoided by the concentration of notes on one point to a particular precedent. A serious effort has been made to give suitable cross-references, though there is room for improvement. Thus the discussion of "shares" at p. 147 and "stock" at p. 159 might well be linked, similarly on p. 173 the difficulties of a limitation to a widow until she remarries which are discussed at p. 198 ought to be referred to, so the discussion at pp. 74 and 96 of maintenance and income should be linked. In a future edition it may also be helpful if cross-references are to pages of notes rather than precedents.

On one or two matters more might be said, at p. 167 a distinction between general and special powers ought perhaps to be made, and more might be said of the effect of a codicil substituting the name of another executor as if the former were dead. Perhaps too consideration might be given to the question whether it is still desirable to treat sons and daughters differently in the limitation to them on attaining twenty-one or *being daughters* should marry under that age. The main work was overtaken by the Intestates' Estates Act, 1952, and so is completed by a Supplement giving the text of the Act, and a discussion of it which is one of the most useful that has yet appeared.

Perhaps too much space has been given to adverse comment by illustration of matters which appear to limit its usefulness. There are still some such

matters, but this edition is undoubtedly a step forward. It is one which does much to revivify a standard book. The only regret is that, so much having been done, publication could not have been delayed to allow more. For the completion of the task the present edition is a good augury. Finally, for those who think precedent books dull, let them sit and weave the story of the captain in Her Majesty's —— Regiment of Foot now temporarily resident for the purposes of study at —— in France who at p. 170 sits down to make his will. There is much of life to be found in wills.

J. D. B. Mitchell.

Laws and Regulations on the Regime of the High Seas. Compiled by the Division for the Development and Codification of International Law of the Legal Department of the Secretariat. [New York : United Nations. Vol. 1, 1951. xviii and 307 pp. 25s. Vol. 2, 1952, xi and 142 pp. 17s. 6d.]

Perhaps the most valuable of the publications of the Secretariat of the United Nations are those which contribute to research in various fields by providing useful collections of documents, not all of which would otherwise be readily available. Among the documentary collections, those in the legal field are particularly useful. International lawyers are already indebted to the Secretariat for the collections of *International Tax Agreements* and for the five volumes so far published of Reports of *International Arbitral Awards*. The *Yearbook on Human Rights*, particularly now that it includes municipal decisions as well as legislation, has an appeal for both international and comparative lawyers. The Legal Department has now placed such lawyers deeper in its debt by inaugurating a United Nations Legislative Series, the first publication in which is the two volumes of *Laws and Regulations on the Regime of the High Seas*.

Since 1945 and the publication of the Truman Proclamation concerning the continental shelf and the exploitation of marine resources, international lawyers and government departments have been vitally interested in the controversy between the doctrine of the unrestricted freedom of the seas and the claim that parts of the high seas, together with the seabed and its subsoil, are amenable to exclusive jurisdiction by littoral States. Volume 1 is devoted to legislation, defined to cover statutes, decrees, regulations, orders and the like, and international agreements on the continental shelf, contiguous zones and the supervision of foreign vessels on the high seas. Among these documents, perhaps one of the most interesting is the Portuguese Decree of 1910. This is the earliest municipal measure cited in the section on the continental shelf and in many ways may be regarded as the forerunner of the spate of documents issued after 1945, for the reasoning of the Truman Proclamation seems to follow it very closely.

At a time when the United States Congress is considering legislation concerning ownership of the "tidelands," thus honouring President Eisenhower's electoral promises to California, Louisiana and Texas, it is convenient to be able to read the State legislation relating to these areas. Unfortunately, the Californian legislation is missing, but the Texan statute "declaring the sovereignty of Texas along its seacoast" is included in the national legislation on the continental shelf, while that "to declare the sovereignty of Louisiana along its seacoast and to fix its present seacoast boundary and ownership" appears among the national legislation on contiguous zones.

A number of Soviet decrees on contiguous zones is included, but there is no reference to the Russian imperial decree of 1916, reissued as a Soviet Note in 1924, claiming sovereignty over "the northward extension of the continental platform of Siberian mainland." Another surprising omission relates to Norway. All that appears is a single paragraph from a Royal Resolution of 1932 relating to customs dues in the contiguous zone, but one looks in vain for

any of the documents that were of such significance in the recent *Anglo-Norwegian Fisheries* case.

Volume 2 consists of national legislation dealing with criminal jurisdiction over acts committed abroad or on the high seas, on board a ship or aeroplane. The United Kingdom is represented by the relevant sections of the Merchant Shipping Act, 1894, and the Civil Aviation Act, 1949. Unfortunately, there is no reference in this volume to international agreements, such as the Anglo-Swedish Consular Convention under which Westburg was returned to Sweden for trial in 1952. It is useful, however, to be able to refer to the Turkish legislation which is relevant for the trial of the foreign naval officer accused of manslaughter after the collision of his vessel with a Turkish submarine.

It is to be hoped that the Secretariat will publish amending texts as they become available—it would be interesting to read the South Korean Proclamation of 1952 claiming sovereignty over the adjacent seas. Similarly, the two volumes lack a companion—that containing texts concerning jurisdiction over territorial waters—but the Series is still young and has already proved its value.

L. C. GREEN.

L'INTERNATIONALISATION DES CONSTITUTIONS. By YVES LS. AUGUSTE. [226 pp.]

THE author of this book published in Spain is the Secretary of the Embassy of Haiti in Madrid. He is an enthusiast for the Rights of Man which were laid down in the French Revolution long before the Universal Declaration of Human Rights. His main concern is to examine how those rights can be assured by international law and by international organs. The theme of the book is the relation of constitutional to international law. It stresses the close link between international peace and individual liberty. The author is master of the modern theories of Kelsen and Verdross about the primacy of law over the State. He is naturally also master of the Spanish and Latin-American contributions to international law, and quotes them freely. The recognition of international law by governments, and a provision in the Constitution that international law is part of the law of the State is not, however, enough to secure the observance of the rights sanctioned by international law. Some means of implementing that law must be found if it is to be an effective assurance of the rights of the individual. We cannot rely on national courts to uphold the rights of the citizen against his own State. So the individual must have some recourse to an international body when he complains that his rights are violated.

The author examines and approves the idea, put forward originally by M. Cassin, the delegate of France and a distinguished jurist, before the Human Rights Commission, for the appointment by the United Nations of a *Ministère Public*, or Attorney-General, who would take up the complaints of individuals about violation of human rights prescribed by the constitution or by International convention. But he puts forward an original proposal that the defence of these human rights should be entrusted to the Diplomatic Corps in any country. It would, he thinks, be feasible to make the heads of the Diplomatic Missions a Parquet of the United Nations. That idea appears somewhat fanciful in the present state of international relations. A judicial officer, chosen by the United Nations as Attorney-General, with the special function of examining and presenting complaints of denial of human rights to an international committee or tribunal, would seem to offer a better assurance of impartiality.

The study of the relation between constitutional and international law is a timely contribution to one of the larger issues before the World Society which the establishment of the Human Rights Commission of the United Nations has emphasised.

N. B.

INTRODUCTION TO ENGLISH LAW. Second Edition. By PHILIP S. JAMES, M.A., of the Inner Temple, Barrister-at-Law, Professor of English Law in the University of Leeds. [London: Butterworth & Co. (Publishers), Ltd. 1953. xxvi and 426 and (index) 22 pp. 15s. net.]

IT is a pleasure to see a second edition in which there is so much evidence of care having been taken to eliminate the imperfections which disfigured the first edition. There are still some blemishes, ranging from trivial misspellings of judicial names (such as Lord Cairns' Act being spelled variously Lord Cairn's Act (pp. 40, 311) and Lord Carn's Act (p. 17 of the Table of Statutes)) to overstatements, such as that of the effect of the Law of Property Act, 1925, s. 29 (1) on p. 344, and the assertion on p. 392 that charities are exempt from the rule against perpetuities (the rule that property may be held in trust for a charity for an indefinite period of time is separately mentioned in the next sentence). But the book contains much accurate information on an immense range of subjects, presented in a simple way. Furthermore, it is very much up to date. As it now stands the book may be recommended as fulfilling the purpose for which it was intended.

R. E. M.

NOTABLE BRITISH TRIALS SERIES. Vol. 76: THE "VERONICA" TRIAL. Edited by G. W. KEETON and JOHN CAMERON. [London: William Hodge. 1952. 248 pp. 15s. net.]

THIS new volume in the *Notable Trials* series goes back to the years 1902 and 1903 and recounts one of the rare instances in modern times when acts of piracy and what in non-technical language would be described as mutiny occupied an English court. The story of events on board the Liverpool barque *Veronica* on her last journey from the Gulf of Mexico to Monte Video which emerges from the transcript of the Notes of Evidence and Speeches preserved by the late Sir Alfred Tobin, K.C., has none of the romantic flavour of an R. L. Stevenson; it is on the contrary an account of most sordid treachery and butchery which involved the murder in cold blood of the master and no fewer than six of the eleven hands on board for no apparent motive. The four mutineers, who abandoned ship together with the black cook after setting fire to the barque (which was never seen again), might conceivably have got away with a rather thin tale of shipwreck if they had held together. As it happened, the cook gave away the truth as soon as they were picked up and at the trial the weakest and most cowardly of the four murderers was allowed to turn King's Evidence and so became available as another witness for the prosecution. Piracy was charged in the indictment, but the prosecution only proceeded on the charge of murder of the captain; the three accused, having vainly tried to establish that the three officers had intended to throw half the crew overboard, were sentenced to death.

H. A. H.

WURTZBURG'S LAW RELATING TO BUILDING SOCIETIES. Tenth Edition. By JOHN MILLS, O.B.E., B.A., of the Middle Temple and Lincoln's Inn, Barrister-at-Law, assisted by BRYAN J. H. CLAUSON, M.A., of Lincoln's Inn, Barrister-at-Law. [London: Stevens & Sons, Ltd. 1952. xxxv and 406 pp. £2 2s.]

THE value of this book is testified by the fact that recent editions have been called for at regular intervals of about five years. It must be said, however, that hitherto this value has been mainly as a handy compilation of the relative

legislation rather than as a practical guide on points of difficulty which recent editions have tended to shun rather than to elucidate. Happily Mr. Mills and his learned assistant have now undertaken a thorough and overdue revision of the text, concentrating on the position of incorporated societies, regrouping a number of chapters and rewriting several of them including the all-important ones on Mortgages and Additional Security. In so doing, valuable observations are made on a number of topical problems, such as those of securing a flexible interest rate, providing for town planning liabilities, protection against letting by mortgagors, the form of statutory receipt to be adopted, the procedure for obtaining possession, and the possibility of making advances in excess of valuation. While one may sometimes disagree with the editors' views (for example, their opinion on the last mentioned problem seems to the reviewer singularly unconvincing, involving as it does the argument that an advance is not made on the security of land if its amount exceeds the last purchase price) there can be no doubt that the usefulness of the book is immensely increased by containing a discussion of these matters. It may now be cordially recommended, not merely as the only up-to-date book, but as a *good* and up-to-date book, to building society officials and their legal advisers.

L. C. B. G.

Company Accounting. By J. F. Bateman, B.Com., A.C.A. [London: Stevens & Sons, Ltd. 1952. xii and 156 pp. 30s.]

This is the fourth in the "Business Law and Administration" Series. It deals concisely with the major questions arising out of company accounting and should prove a useful general guide to those who already have some knowledge of both company organisation and book-keeping technique. It is hardly suitable for law students, whose need for a simple introduction to this subject remains unmet, or for practitioners who are unlikely to find sufficiently detailed guidance. It may be welcomed by those students of accountancy, who are not deterred by its high price or the somewhat unattractive style in which it is written, but it seems doubtful whether it displays sufficient originality of approach to justify a further addition to the many existing books on the subject.

L. C. B. G.

Derecho de Sociedades Anonimas ("Law of Joint Stock Companies"). By Professor José Giron Tena, Professor of Mercantile Law at Valladolid University. [Valladolid: Faculty of Law, University of Valladolid.]

This work has arrived at a most important moment, and is of inestimable value to the practising Spanish jurist. The moment is important because until 1951 virtually the whole of the fundamental law of Spain relating to Joint Stock Companies ("Sociedades Anonimas") was contained in some twenty Articles of the Commercial Code. The patent inadequacy of the law in modern conditions gave rise to the promulgation of the comprehensive Spanish Law of Joint Stock Companies ("Ley de Sociedades Anonimas") on July 17, 1951, and in May, 1952, Giron Tena produced his admirable work.

In it the author deals at length with legal concepts which up to the time of the new law had no specific or detailed place in Spanish legislation, such as company promoting, auditors, amalgamations, reserves, increases and reductions of capital, consolidated accounts, and a host of other matters which came before average Spanish practitioners as a matter of law for the first time. He explains and comments on the 171 Articles of the Law and its Schedules in a clear and concise manner; and it is interesting to note that

in this connection he has been assisted by the comparative legislation of Great Britain, France, Germany, Switzerland and Italy.

There are, of course, other excellent works recently published in Spain on the new Spanish company law, by eminent jurists such as Garrigues, Gay de Montella and Bergamo, and it is to the credit of these authors and to the credit of José Giron Tena that such full and detailed works should have been published at a time when there has been as yet no guidance from Spanish Supreme Court decisions or from any other source, except foreign law. Indeed, as occurs in Spain, it will be the work of Giron Tena and his fellow authors which will assist the courts in these new fields.

Rafael Valls.

Frederic William Maitland. By H. A. Hollond, d.s.o., o.b.e., Selden Society, Annual Lecture, March 18, 1953. [London: Bernard Quaritch, 11, Grafton Street, W. 4s. net.]

Professor Hollond, writing as one who knew Maitland and many of his friends and colleagues, gives a vivid impression of the personality of the most famous of English legal historians. The address is printed with a reproduction of a photograph of Maitland and a facsimile of a letter written by him during the last year of his life.

A First Book of English Law. Second Edition. By O. Hood Phillips, m.a., b.c.l. [London: Sweet & Maxwell, Ltd. 1953. xxiv and 293 pp. 17s. 6d. net.]

This edition incorporates references to more than twenty statutes passed since 1948, some of the most important recent decisions and some new ideas, such as the suggestion that the standardisation of contracts leads ultimately to control of monopolies by the Government or public corporations. As this book is closely packed with information it cannot be claimed for it that it is as easily readable as other introductions to English law; but as regards accuracy and attention to detail it is unsurpassed by other books written for the same purpose.

Books and Publications Received:—

The Lawyer's Companion and Diary, 1954. Editors: Ernest L. Buck and Leslie C. E. Turner. [London: Stevens & Sons, Ltd. Shaw & Sons, Ltd. 25s. net.]

ABC Guide to the Practice of the Supreme Court. Thirty-seventh Edition. By D. Boland, m.b.e. [London: Sweet & Maxwell, Ltd. 1953. 395 pp. 30s. net.]

Current Legal Problems, 1953. Edited by George W. Keeton and Georg Schwarzenberger. Vol 6. [London: Stevens & Sons, Ltd. 324 pp. 37s. 6d. net.]

Learning the Law. By Glanville L. Williams, ll.d. Fourth Edition. [London: Stevens & Sons, Ltd. 1953. xiv and 210 pp. 12s. 6d. net.]